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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 709

PAUL V. McNUTT, GOVERNOR OF THE STATE OF INDIANA, ET AL., APPELLANTS,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

FILED JANUARY 21, 1936.

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[fol. 1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

In Equity. No. 1686

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED, Complainant,

against

PAUL V. MCNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; Richard A. McKinley, Director of the Department of Financial Institutions of the State of Indiana; Oscar P. Welborn, Harvey B. Hartsock, C. M. Setser, Myron Gray and Robert Batton, Members of the Commission for Financial Institutions of the State of Indiana; Herbert M. Spencer, Prosecuting Attorney for the Nineteenth Judicial Circuit of The State of Indiana, Defendants

For Temporary & Permanent Injunction

[fol. 3] BILL OF COMPLAINT—Filed June 22, 1935

General Motors Acceptance Corporation of Indiana, Inc. (hereinafter designated as "G. M. A. C."), a corporation, brings this its Bill of Complaint against the above named defendants and respectfully shows unto this Honorable Court as follows:

First. G. M. A. C. is a corporation duly organized and existing under the General Corporation Act of the State of Indiana, with the power under its charter to buy contract obligations, is a citizen and resident of the State of Indiana and has its principal place of business in that State in the City of Indianapolis, County of Marion.

The defendant Paul V. McNutt is the duly elected, qualified and acting Governor of the State of Indiana and is a resident of the City of Indianapolis in the Southern District of said State.

The defendant Philip C. Lutz is the duly elected, qualified and acting Attorney General of the State of Indiana, and is a resident of the City of Boonville in the Southern District thereof.

The defendant Richard A. McKinley is the duly appointed Director of the Department of Financial Institutions of the State of Indiana, and is a resident of the City of Jeffersonville in the Southern District thereof.

The defendants Oscar P. Welborn, Harvey B. Hartsock, C. M. Setser, Myron Gray and Robert Batton are the duly appointed members of the Commission for Financial Institutions of said State, the said Welborn and Hartsock residing at Indianapolis in the Southern District thereof, the said Setser residing at Columbus in the Southern District thereof, the said Gray and Batton residing respectively at Muncie and Marion in the Northern District thereof.

The defendant Herbert M. Spencer is the duly elected, qualified and acting Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana, wherein Complainant's principal place of business is situate, and resides at Indianapolis in the Southern District of Indiana.

Second. This is a suit of a civil nature arising under the Constitution and Laws of the United States. The matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars in value, exclusive of interest and costs.

Third. G. M. A. C. is now, and for a number of years last past has been, engaged in the business of purchasing retail instalment sales contracts covering products manufactured by General Motors Corporation or its divisions and sold by dealers. Most of these retail instalment sales contracts involve purchases where the cash price would be less than $1500.00 and in all of them G. M. A. C. obtains by purchase and assignment thereof a security interest in the goods sold.

[fol. 4] Fourth. Under arrangements with Retail Sellers, G. M. A. C. has for many years purchased and desires to continue to purchase retail instalment contracts at such prices and on such terms and conditions as may from time to time be agreed upon by G. M. A. C. and Retail Sellers. The business relationship presently existing between G. M. A. C. and a large number of Retail Sellers engaged in the business of selling at retail new and used automo-

biles and other General Motors products in the State of Indiana is mutually of great business advantage and value.

Fifth. By approval of the Governor of the State of Indiana on March 11, 1935, Chapter 231 of the Laws of 1935, theretofore enacted by the General Assembly of the State of Indiana, became a law. This law is entitled "An Act to license and regulate and to promote competition in the business of purchasing contracts arising out of retail instalment sales, to prescribe the form of such contracts, to empower the Department of Financial Institutions to classify retail instalment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail instalment sales"—and becomes effective, by its terms, from and after the 1st day of July, 1935. A copy of said Act is attached hereto, marked "Exhibit A", and made a part hereof.

Sixth. Complainant is advised by its counsel and, therefore, avers that said Act is unconstitutional and void in that its enforcement would deprive complainant of its property without due process of law and deny to it the equal protection of the laws, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, by illegally delegating to the Department *for* Financial Institutions legislative powers in violation of Section 1 of Article III of the Constitution of the State of Indiana, and by arbitrarily, unreasonably, and unjustifiably regulating and controlling the business and affairs of the complainant and fixing the terms and price at which and the manner in which Retail Sellers may sell and conduct their sale of automobiles and other General Motors products at time prices payable in instalments and the manner, terms and price in and at which Retail Sellers may sell and G. M. A. C. may purchase the instalment sale contracts arising from such sales.

Seventh. The sections of the Act particularly complained of are the following:

(a) Sections 6, 26 and 10, and Sections 7 and 8 which provide as follows:

(1) Sections 6, 26 and 10 provide that the Department of Financial Institutions is directed, upon investigation and by general order, to classify retail instalment sales or con-

tracts arising therefrom, to determine and fix the "fair maximum finance charge" that may be contracted for in any retail instalment contracts, from time to time to re-[fol. 5] classify such sales and contracts and redetermine and refix the maximum "finance charge", and to determine and fix the "fair maximum charges" which may be contracted for in any retail instalment contract for failure on the part of the buyer to pay any instalment of the time balance when it is due; that every retail buyer under an instalment sale contract may at any time prepay the then unpaid time balance owed on any retail instalment contract and thereupon become entitled to a reduction of the balance due in an amount to be fixed by said Department; that retail sellers shall not receive any benefit from or part of any amount collected or received from any retail buyer as a finance charge, and that no person engaged in the business of purchasing retail instalment sales contracts shall contract to pay or pay to retail seller any part of the amount collected as a finance charge, in excess of the maximum amount to be fixed by the Department of Financial Institutions, which amount is to be fixed without regard to any differentiation as to whether the retail instalment contract is sold with recourse on retail sellers or without recourse or under an agreement by which retail sellers agreed to repurchase the goods if the buyer defaults and such goods are repossessed.

(2) Sections 7 and 8 provide that if retail sellers contract for or receive from any retail buyer any amount whatsoever, for examination, service, brokerage, commission, expense, fee or other thing of value in excess of or in addition to the amount of the finance charge, charges, fees and taxes permitted by the Act, the indebtedness evidenced by the instalment contract and the security interest created thereby shall be enforceable against the retail buyer only to the extent of the principal balance unpaid thereon; and that even such "fees" as may be lawful may not be included in the principal balance fixed in the retail instalment contract.

(b) Sections 9, 11, 12, 13 and 15, which provide that retail sellers may sell their retail instalment contracts only to persons licensed under the Act; that no person may engage in the business of purchasing such contracts from retail sellers unless such person files an application, pays a

fee of one hundred dollars and receives a license from the Department of Financial Institutions; that the Department of Financial Institutions is authorized to reject any application for a license if it finds that the applicant cannot "operate its business economically and efficiently" and to revoke or suspend any license if it finds that the lecensee has "wilfully avoided or attempted to avoid the operation or effect of this Act" by purchasing any retail instalment contract or contracts "at a less price than the unpaid balance thereon";

[fol. 6] (c) Sections 18, 19, 20, 25, 27 and 29, which provide that annual reports be filed under oath by licensees giving such information as may be required by the Department concerning the business and operation of the licensee; that the Department may at any time investigate the books, accounts, records and files of licensees, and the business of any person, not a licensee, who is doing any business, the doing of which is prohibited by the Act to persons other than licensees or banks or trust companies; that fees shall be paid by licensees to cover the expenses of the Department, including those incurred in fixing the maximum finance charge; that the Department may make from time to time rules and regulations governing the business done in the State by licensees; and that, upon conviction for violation of any of the provisions of the Act or of the rules or regulations promulgated by the Department, the penalty shall be a fine of not more than $1,000.00 or imprisonment for not more than one year, or both.

(d) Sections 1, 2 and 4 which provide that the operation of the Act shall be limited exclusively to those instalment sales where the cash price, as defined in the Act, would be $1500. or less and a security interest in the goods is retained; that the Act shall not apply to instalment sales where such cash price would be $1500. or less, but where no security interest is retained; that the Act shall not apply to instalment sales where the price is payable at a future date in but one instalment, or to instalment sales of articles in bulk where such cash price would, in total, exceed $1500, even though, if such articles were sold individually, the individual instalment sales would be subject to the provisions of the Act; that the use of forms of instalment sale contracts presently in use be discontinued, and that new contract forms drawn up in the manner and containing the

specific items provided for in the Act be used after its effective date.

Eighth. Complainants are advised and, therefore, aver that each of the defendants, in their respective capacities herein above designated, claims he is vested with the power and charged with the duty of enforcing said Act; that the Department of Financial Institutions is about to cause to be published orders respecting classes of retail instalment sales or contracts, maximum "finance charges," maximum charges which may be contracted for in retail instalment contracts for failure on the part of retail buyers to pay any instalment of the time balance when it is due, the amount of the reduction to which retail buyers are to be entitled upon prepayment of the unpaid time balance and the maximum amount, collected or received as a "finance charge" from any retail buyer, which may be paid by licensees to and received by retail seller; and that defendants now publicly declare that the said act is a valid law appli- [fol. 7] cable to the business of G.M.A.C. and publicly threaten and declare that they will enforce the same in all of its provisions.

Ninth. The present net worth of Complainant's business is in excess of $50,000.00. In the conduct of its business Complainant, G. M. A. C., maintains offices in the cities of Indianapolis, Fort Wayne and South Bend. The aggregate yearly rent for such offices amounts to $13,147.00. It employs on the average, approximately 85 employees, whose aggregate salaries amount to approximately $150,000.00 yearly. In the calendar year 1934 it purchased retail instalment contracts in the State of Indiana aggregating in excess of $7,000,000.00, and its estimated volume of such purchases for the first six months of 1935 is in excess of $4,000,000.00. During the calendar year 1934 G. M. A. C. purchased in the State of Indiana approximately 23,000 instalment sales contracts from more than 500 retail sellers.

Tenth. Irreparable damage and injury upon complainant and upon its business will ensue unless this Honorable Court shall re-train enforcement of the Act as threatened by the defendants, and, particularly, the enforcement of the following provisions thereof:

(a) the provisions of the Act granting to the Department of Financial Institutions the power to fix prices by

fixing and changing from time to time, on thirty (30) days' notice, the maximum "finance charge" and, accordingly, the maximum time price at which retail sellers may sell their automobiles (Sections 6 and 26), together with

(b) the provision of the Act (Section 15 (d)) which limits the amount which G. M. A. C. may receive as its gross profit for the purchase of an instalment contract to a sum not exceeding such maximum "finance charge",—by prohibiting G. M. A. C. from purchasing any retail instalment contracts "at a less price than the unpaid balance thereon"; and

(c) the provisions of the Act granting to the Department of Financial Institutions the power to fix from time to time, on such notice as it may determine, the amount of the reduction in the unpaid time balance to which retail buyers are to be entitled upon prepayment of the unpaid balance of their instalment contracts, and, accordingly, the value of all such contracts which may be purchased by and assigned to G. M. A. C. (Section 6); and

(d) the provisions of the Act granting to the Department of Financial Institutions the power from time to time to fix, on such notice as it may determine, the maximum [fol. 8] amount which may be given by G. M. A. C. to retail sellers out of the "finance charge" received from retail buyers under instalment sale contracts sold to G. M. A. C., and requiring the Department to fix such maximum without regard to any differentiation as between contracts sold to licensees by retail sellers with recourse against such sellers and contracts sold by retail sellers without recourse against them (Section 10); and

(e) the provisions of the Act granting to the Department of Financial Institutions the power from time to time to fix, on such notice as it may determine, the maximum amounts which may be charged the retail buyer for failure to pay any instalment of the time balance when it is due (Sections 6 and 26).

The right of the Department of Financial Institutions from time to time to exercise the foregoing powers will work continuing irreparable damage upon the business of G. M. A. C. by creating uncertainty which will impair the efficiency of its operations and its earnings, and by render-

ing hazardous the making of any future commitments or any contracts extending over definite periods of time for the purchase of retail instalment contracts, the determination of its borrowing requirements and the obtaining of capital required in the conduct of its business.

(f) the provisions of the Act which restrict the future sale of instalment sale contracts to those parties only who have a license from the Department of Financial Institutions (Sections 9, 11, 15), and impose upon G. M. A. C. burdensome requirements with respect to the keeping and publicity of records and the payment of license and other fees (Sections 18, 19 and 20); and

(g) the provisions of the Act which subject G. M. A. C. to severe and excessive liabilities, both civil and criminal, for any violation of the Act (Section 29).

Eleventh. Complainant is without adequate remedy at law in the premises and it is only in a suit of this nature and by the injunctive process of this Court that such irreparable damage and injury can be avoided and complainant fully protected in the enjoyment of its property and rights as aforesaid.

Wherefore, your complainant prays that a temporary restraining order issue, enjoining and restraining said defendants and each of them from enforcing or attempting to enforce against this complainant the provisions of said Act and the penalties therein prescribed for its violation until such time as complainant's application for temporary injunction herein prayed, can be heard and determined; that the judge of this court enter an order immediately calling to his assistance to hear and determine this application two other judges, according to the provisions of the [fol. 9] statutes of the United States; that an order be issued directing the several defendants and each of them in their capacities above designated to show cause before this honorable court, as thereby constituted, at a time and place to be fixed by this court, why writs of preliminary injunction should not issue herein prior to July 1, 1935, the effective date of the Act, temporarily restraining and prohibiting the said defendants and each of them, their agents and employees, from enforcing or threatening to enforce the provisions of the said Act and the penalties for violations

of its provisions and that at the hearing of this application said writs issue.

And complainents further pray that the process of this Court, as a court of equity, do issue against said defendants and each of them, requiring them fully and completely to answer this bill of complaint but not under oath, their answer under oath being waived; and that after due hearings on the merits, there be judgment perpetuating the said writs of injunction and perpetually enjoining and restraining the said defendants and each of them, their agents and employees, from in any manner enforcing or threatening to enforce against complainants the provisions of said Act, and finally and definitely declaring said Act to be unconstitutional, null, and void, and complainants further pray for all orders and decrees necessary or proper in the premises; and for such other and further relief as to the court may seem just and proper.

General Motors Acceptance Corporation of Indiana, Inc., by L. H. Pomeroy, Vice President, Complainants. Paul Y. Davis, of Counsel. Smith, Remster, Hornbrook & Smith, Solicitors for Complainants.

Duly sworn to by L. H. Pomeroy. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO BILL OF COMPLAINT

Engrossed House Bill No. 377

A Bill for an Act to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such contracts, to empower the Department of Financial Institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales.

Section 1. Definition of Terms.—Be it enacted by the General Assembly of the State of Indiana, That in this act, unless the context or subject matter otherwise requires:

The term "retail installment sale", or the plural thereof, means and includes every retail contract to sell specific goods and every retail sale of specific goods to any person:

(a) in which the cash price of the goods is not in excess of $1500., and may be paid in installments over a period of time and,

(b) in which the seller has taken or retained a security interest in the goods.

The term "person" includes a corporation or partnership of two or more persons having a joint or common interest.

The term "goods" includes all chattels personal other than money, things in action, emblements, industrial growing crops, things so affixed to the land as to become a part thereof, or things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The term "specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

The term "retail" means to dispose of specific goods to, or to acquire specific goods by, a person who may consume such goods for his personal use.

The term "buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

The term "retail buyer" means a buyer who is a party to a retail installment sale, or any legal successor in interest of such person, and includes any person who as surety, indorser or guarantor or otherwise is liable on the obligation created by any retail buyer on any retail installment contract.

The term "seller" means a person who sells or agrees to sell goods.

The term "retail seller" means a seller who is a party to a retail installment sale.

The term "cash price" means the price, measured in dollars, agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail installment sale.

The term "retail installment contract" means any written instrument, lawful under this act, which is executed in connection with any retail installment sale and is required by section 2 hereof or is authorized by section 3 hereof, and the term may include all such instruments executed in connection with any retail installment sale.

The terms "contract to sell", "sale" and "conditional sale" shall have the same meaning in this act as they are respectively defined in the Uniform Sales Act and Uniform Conditional Sales Act.

The term "conditional sale contract" means any written instrument evidencing a conditional sale.

The term "bank or trust company" means any national banking association formed under the laws of the United States with its principal office located in this state and doing business herein and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company, or trust company organized and doing business under the provisions of any law of this state.

[fol. 11] The term "department" means "The Department of Financial Institutions".

The term "manufacturer" means a person who is engaged, directly or indirectly, in the manufacture or distribution of specific goods which may become the subject matter of a retail installment sale in this state.

The term "finance charge" means any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time.

The term "security interest" means a property interest in goods which are the subject matter of a retail installment sale, limited in extent to securing performance of some obligation of the retail buyer or of some third person to the retail seller and includes the interest of a mortgagee of the goods and title to the goods whether or not expressed to be absolute, whenever such title is, in substance, retained for security only.

Section 2. Written Instrument.—Every retail installment sale shall be evidenced by an instrument in writing signed by the retail buyer, and a copy thereof shall be delivered to him by the retail seller at the time of its execution. An acknowledgment of the delivery thereof contained in the body of the instrument shall be conclusive proof of delivery in any action to enforce any obligation arising out of the retail installment sale. The written instrument shall contain all of the agreements of the parties made with reference to the specific goods which are the subject matter of the retail installment sale, and shall set forth specifically all items and matters required by this act. The reference

to insurance shall recite generally the type or types of insurance the retail seller has agreed to procure for the retail buyer but such reference to insurance shall not be construed to imply the scope of the coverage, the terms, exceptions, limitations, restrictions or conditions of the contract or contracts of insurance to be furnished. Nothing in this act shall be construed to require the retail seller to comply with the provisions hereof at any time prior to the delivery of the specific goods to the retail buyer.

Section 3. Retail Installment Contracts.—Any retail seller may require any retail buyer to execute and deliver a promissory note to evidence the indebtedness created by any retail installment sale, and, to secure the payment of the indebtedness created by the sale or evidenced by the promissory note or to secure the performance of any other condition of the sale, may require the retail buyer to execute and deliver a conditional sale contract, chattel mortgage or other instrument to give the retail seller a security interest in the specific goods which were the subject matter of the retail installment sale. The written instrument required by section 2 hereof may evidence a conditional sale.

Section 4. Provisions of Written Instruments. Every written instrument evidencing a retail installment sale shall recite the following separate items as such and in the following order:

(1) The cash price of the specific goods.

(2) The amount in cash of the retail buyer's down payment, whether made in money or goods or partly in money or partly in goods.

The term "down payment" for the purpose of this section, shall mean that part payment of the cash price required by the retail seller as a condition to the delivery of the specific goods sold or to be sold or to the extension of credit to the retail buyer for any portion of the cash price.

(3) The unpaid balance of the cash price payable by the retail buyer to the retail seller which is the difference between items (1) and (2).

(4) The cost to the retail buyer of any insurance the retail buyer has agreed to procure, if the retail seller has

agreed to purchase the insurance and extend credit to the retail buyer for the price thereof.

(5) The principal balance owed on the retail installment contract which is the sum total of items (3) and (4).

(6) The amount of the finance charge.

(7) The time balance owed by the retail buyer to the retail seller and the number of installment payments required and the amount and date of each payment necessary finally to pay the time balance which is the sum total of items (5) and (6).

[fol. 12] Item (4) and item (6) may be added together and stated as one sum in the written instrument and if so stated item (5) may be omitted, but in such event the retail seller shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract a statement reciting the separate amounts of items (4) and (6).

Section 5. The Insurance.—Any retail seller who, in any retail installment contract, has agreed to purchase insurance for the retail buyer and to extend credit for the price thereof, shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract, a policy or policies of insurance or in lieu thereof a certificate briefly describing the protection afforded by the insurance procured, and the kind and amount thereof. If the premium for insurance of like kind and amount, as fixed in the published manual of a recognized standard rating bureau designated by the retail seller, is less than the amount charged the retail buyer as fixed in the written instrument in compliance with item (4) of section 4 hereof, the retail buyer may deduct an amount equal to the difference from the amount of the last payment owed the retail seller. If, before the sale, assignment or transfer of the retail installment contract, the retail seller has not purchased the insurance for the retail buyer which the former, under the terms of the retail installment contract, is required to purchase, any licensee hereunder who becomes the owner, assignee or transferee of the retail installment contract shall, within twenty-five days after the execution of the assignment, pur-

chase the insurance and mail the policies or certificates, instead of the retail seller as required above, and may, subject to the provisions of this section, collect and receive the amount of the cost thereof which was included as a part of the principal balance on the retail installment contract.

Section 6. The Finance Charge and Prepayment.—Subject to the provisions of this act, any retail seller at the time of making any retail installment sale may contract for the payment of a finance charge by the retail buyer and collect and receive the same. The finance charge contracted for in any retail installment contract may not exceed the maximum finance charge then authorized by the department as in this act provided. Every retail buyer shall have the right, at any time, to pay the then unpaid time balance owed on any retail installment contract, whether then due or not, and upon payment therefor, any holder of the retail installment contract shall reduce the amount of the then unpaid time balance by the amount fixed and determined in accordance with the regulations of the department in force as of the date of the making of the particular retail installment contract and applicable to such cases. The reduction herein authorized may be known as a discount and every retail buyer, upon full prepayment of any unpaid time balance owed by him on any retail installment contract, shall receive the discount but only in the amount, at the times and upon the conditions provided herein. The department shall and is hereby authorized to fix and determine the amount of any discount to be given for prepayment as in this section authorized but no such discount shall be for an amount in excess of the amount of the finance charge on any particular retail installment contract.

Every retail seller may, at the time of making any retail installment sale, contract for the payment by the retail buyer of lawful delinquent charges for failure to pay any installment of the time balance on the date specified in the retail installment contract, and any retail seller or any lawful holder of a retail installment contract in which delinquent charges are contracted for may collect and receive the charges lawfully contracted for.

Section 7. Limitation on Amount of Debt and Charges.—No retail installment contract authorized by section 3 of this act which is executed in connection with any retail in-

stallment sale shall evidence any indebtedness in excess of the time balance fixed, in the written instrument in compliance with item (7) of section 4 of this act, but it may evidence in addition, any agreements of the parties including agreements for the payment of delinquent charges, taxes and fees, including attorney's fees. No retail seller, directly or indirectly, shall contract for or receive from any retail buyer as consideration for the extension of credit to the retail buyer, for the amount of the principal balance, any further or other amount whatsoever for examination, service, brokerage, commission, expense, fee or other thing of value than the finance charge, charges and fees permitted by this act, taxes on account of any retail installment contract or on specific goods sold thereunder and any lawful fees actually paid out by the retail seller to any public officer for the filing or recording or releasing any instrument securing the payment of the obligation owed on any retail installment contract. The lawful fees may be collected when the retail installment contract is made or at any time thereafter, but may not be included in the principal balance fixed in the written instrument in compliance with Item (5) of section 4 hereof.

[fol. 13] Section 8. Limitation on Recovery and Enforcement of Lien.—No retail installment contract which evidences an indebtedness greater than allowed by section 7 hereof and no retail installment contract in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable against any retail buyer for any amount in excess of the principal balance thereof and no security interest created by any such retail installment contract in connection with which an indebtedness is evidenced which is greater than allowed by section 7 hereof or in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable for an amount in excess of the principal balance against any retail buyer in default under the terms of the retail installment contract.

Section 9. Limitation on Assignment of Contracts.—Except as in this section otherwise provided, every retail installment contract shall be assignable and the interest therein transferable to any person or persons. No retail seller may sell, assign and transfer any retail installment

contract to any person other than a licensee under this act. Any retail installment contract which is or has been owned by a licensee may be enforced and collected by the holder thereof according to its lawful terms.

Section 10. Purchase of Retail Installment Contracts.—Any licensee hereunder may purchase any retail installment contract on such terms and conditions not inconsistent with the provisions of this act, and at such price and upon such terms as to the payment of the price, as may be agreed upon between the licensee and the retail seller. The records of the licensee shall show the price actually paid for retail installment contracts separately assigned to such licensee but retail installment contracts may be assigned in group or in bulk to any licensee as may from time to time be authorized by the department by regulation without disclosing the purchase price of the individual retail installment contracts. The department is authorized to make regulations from time to time concerning the purchase by licensees of retail installment contracts in group or in bulk and any purchase of such retail installment contracts made within the terms of the regulations shall not be construed as an attempt to avoid the operation and effect of this act.

No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed.

The provisions of this section shall not apply to any bona fide loan made to any retail seller which the retail seller is under an unqualified duty to repay as such, and which he has secured as to payment, by the sale, assignment, or transfer of retail installment contracts to the lender.

Section 11. Licensees.—No person shall purchase retail installment contracts from a retail seller doing business in this state or engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or trust company make loans to a retail seller doing business in this state on the security of retail installment contracts or engage in the business of making loans to retail sellers in this state on the security of retail installment contracts unless the department has licensed such person to do such business and has issued to the person a written instrument evidencing the license as in this act provided. Any person who desires to purchase retail installment contracts from retail sellers doing business in this state or to engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or trust company, to make loans to retail sellers doing business in this state on the security of retail installment contracts or to engage in the business of making loans to retail sellers doing business in this state on the security of retail installment contracts, shall file an application for a license on forms prescribed by the department and pay the fees required herein.

[fol. 14] Section 12. Application for License and Fees.—The application for license shall contain:

(a) the name and address of the principal office of the applicant,

(b) if applicant has one or more branches operating in this state, the place of business of each such branch at the date of the application,

(c) the trade name, if any, under which applicant's business is to be conducted and if applicant is a co-partnership, the name of every member thereof and if a corporation, of each officer and director thereof,

(d) the total authorized investment used or to be used in the business in this state and if a corporation, the amount of the capital stock thereof issued and outstanding,

(e) a statement of the total amount of business transacted by it in this state during the fiscal year next preceding the date of the application,

(f) such other information touching the business of the applicant as the department may require.

The department is hereby authorized to prescribe the forms of the application and require such additional information as to it may seem necessary properly to regulate the business of the licensee. The forms prescribed shall require the applicant to agree to give notice to all retail sellers in this state with which it does business, when requested so to do by the department, of any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges as provided in section 26 of this act and to keep in this state, subject to examination, adequate records pertaining to the business done in this state.

The application shall be verified by the proper person and every applicant, other than a bank or trust company or an industrial loan and investment company authorized to issue certificates of indebtedness or investment, shall pay the department the sum of one hundred dollars as an annual license fee at the time of the filing of the application. Any bank or trust company or industrial loan and investment company authorized to issue certificates of indebtedness or investment which shall apply for a license under this act shall pay the department the sum of ten dollars as an annual license fee at the time of the filing of the application. If the period for which the license is to run is less than six months one-half of the annual fee shall be charged. On or before the 20th day of June in each year every licensee shall pay the department the annual license fee provided herein for such licensee for the year commencing on the next succeeding July 1 and shall file an application in the form prescribed by the department. All license fees collected by the department shall be paid into the state treasury and become a part of the financial institutions fund and subject to the provisions of law relating thereto.

Section 13. Approval or Rejection of Application.—Upon the filing of any application for license and the payment of the license fee required by this act, if the department shall find that the applicant can operate its business economically and efficiently, it shall thereupon issue and deliver a license to the applicant. In considering economic and efficient operation the department shall take into consideration the fact that this act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope. The license shall authorize the applicant to do the business otherwise prohibited by this act. The license shall remain in full force and effect until it is surrendered, revoked or suspended as in this act provided. If the department shall find that the applicant cannot operate its business economically and efficiently within the scope of this act, it shall not issue a license to the applicant but shall notify the applicant of the denial, and return to the applicant the fee theretofore paid. The department shall give every applicant a reasonable opportunity to be heard with respect to the application, and shall approve or deny, by written order, every application for license hereunder within thirty days from the hearing thereon.

Section 14. Form of License. The instrument evidencing the license shall be in such form as may be prescribed by the department, and in addition thereto shall contain the following:

[fol. 15] (a) the name of the person licensed,

(b) the name of all partners if applicant is a co-partnership,

(c) the principal office of the applicant.

The instrument evidencing the license, or a certified copy thereof provided by the department, shall be kept posted conspicuously in the principal office of applicant and in every branch maintained and operated by applicant in this state.

Section 15. Revocation of License. The Department is hereby authorized to revoke or suspend any license issued under this act if, after hearing, it finds:

(a) that the licensee has refused to permit the department to make any examination authorized hereunder or

has failed to pay the cost of any examination made by the department or the annual license fee required hereby or any penalty assessed by the department against the licensee, or

(b) that the licensee has wilfully failed to comply with any rule or regulation of the department lawfully made hereunder, or

(c) that the licensee has wilfully violated any provision of this act, or any rule or regulation of the department lawfully made hereunder, or

(d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement combination or understanding express or implied with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.

The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licenses may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operated by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made.

Section 16. Recourse to Court.—Any person feeling aggrieved with any decision of the department made as in this act provided may commence an action in the circuit or superior court of the county in which the business operated by such person is located against said department as defendant to vacate or set aside any such order or decision of the department upon the grounds that any such regulation, order or decision of the department is insufficient, un-

reasonable or unlawful, in which action a copy of the complaint shall be served with the summons. The answer of the department to the complaint shall be filed within ten days after service of summons. All such actions shall have precedence over civil cases not of the same nature pending in any such court and such circuit or superior court shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions.

Any such proceeding, action or suit to set aside or vacate any decision or order of the department or to prevent in any way such order or decision from becoming effective shall be commenced and every right of recourse to the courts shall be exercised within thirty days after the entry or rendition of such order or decision and the right to commence any such action, proceeding or suit or to exercise the right of any recourse to the courts shall terminate absolutely at the end of such thirty days after such entry or rendition thereof. Either party to any such action in the circuit or superior court shall have a right of appeal to the supreme court of the State of Indiana as in other civil cases.

[fol. 16] Section 17. Surrender of License.—Any licensee hereunder may surrender any license theretofore issued to it by the department at any time after ten days' notice to the department in writing stating that the licensee proposes to and does thereby surrender the license as of a certain effective date named. The surrender of a license by a licensee shall not affect the civil or criminal liability or liability for fees or penalties which the licensee may be under by virtue of any act done prior to the surrender of the license.

Section 18. Report of Licensees.—Every licensee hereunder shall annually on or before the 15th day of March file a report with the department giving such relevant information as the department may require concerning the business and operation of the licensee in this state during the preceding calendar year. The report shall be made under oath and in the form prescribed by the department.

Section 19. Examination of Licensees.—The department may at any time investigate the business done in this state by any licensee hereunder, and for that purpose examine the books, accounts, records and files used and maintained

by such licensees and their agents, brokers or other representatives. The department may also investigate the business of any person who is not a licensee hereunder and who is doing any business or act, the doing of which is prohibited hereby to persons other than licensees or banks or trust companies. For the purpose of discovering violations of this act and procuring information necessary to fix a maximum finance charge applicable to retail installment contracts, the department in making investigations authorized by this section shall have access to all books, accounts, papers, records, files, safes and vaults of any persons being examined and may require such persons to attend and testify relative to any transactions or business which may come within the scope of this act. In case of the disobedience on the part of any person to comply with any lawful order of the department or any lawful subpœna, or upon the refusal of any witness to appear and testify to any matter regarding which he may be lawfully interrogated, upon petition of the department setting forth the facts, it shall be the duty of the circuit or superior court of the county of which such person is a resident, or the judge thereof in vacation, to compel obedience to the lawful requirements of the subpœna or order and to compel the production of necessary and required books, papers, records, documents and other evidence, and upon the failure, refusal or neglect of any person to comply with the order of the court or the judge thereof, such person shall be punished as for contempt of court.

Section 20. Costs of Examination.—The department shall prescribe and fix a schedule of fees, which are hereby imposed and shall be charged and collected by the department, for the services rendered and the duties performed by the department, under and by virtue of the provisions of this act in the supervision, regulation and examination of licensees hereunder and the schedule of fees so prescribed and fixed shall be determined in accordance with the provisions of section 35 of the Indiana Financial Institutions Act. For the purposes of this section a licensee hereunder shall be termed a financial institution. The fees fixed and prescribed in the schedule may include the cost incurred by the department in fixing a finance charge under the provisions of this act. No licensee shall be required to pay any fee for examination unless the cost to the de-

partment of making such examination shall exceed the license fee paid in compliance with the provisions of this act. All costs assessed by the department at the time of the making of any examination and paid by the licensee shall be paid into the state treasury and become a part of the financial institutions fund and subject to the provisions of law relating thereto. If any licensee refuses to permit the department to make an examination it shall be subject to such penalty as the department may assess, not in excess of one hundred dollars for each day any such refusal shall continue. Any penalty assessed by the department may be collected in an action brought in the name of the State of Indiana on the relation of "The Department of Financial Institutions" in the circuit or superior court of the county in which the licensee has its principal place of business.

Section 21. Contracts to Prevent Competition.—No manufacturer shall sell or contract to sell specific goods which may become the subject matter of a retail installment sale in this state, whether patented or unpatented to any retail seller in this state on the condition or with an agreement or understanding, express or implied, that the retail seller shall sell, assign or transfer any retail installment contracts arising from the retail installment sales of the goods, or any part thereof only to a designated licensee or class of licensees, when the effect of the condition, agreement or understanding may be to lessen or eliminate competition, or create, or tend to create, a monopoly in the licensee or class designated. Any such condition, agreement or understanding with any retail seller in this state is hereby declared to be against the public policy of this state and to be unlawful and void.

[fol. 17] Section 22. Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly, to any retail seller in this state by any manufacturer that the manufacturer will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell, specific goods which may become the subject matter of a retail installment sale in this state, whether patented or unpatented, to the retail seller, unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to

any designated licensee or class of licensees, shall be prima facie evidence that the manufacturer has sold or intends to sell such specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

Section 23. Further Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly to any retail seller in this state by any licensee hereunder that is affiliated with or controlled by any manufacturer that the manufacturer will terminate his contract with or cease to sell specific goods which may become the subject matter of a retail installment sale to the retail seller unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to the licensee making the threat, shall be presumed to be made at the direction of and with the authority of the manufacturer and shall be prima facie evidence of the fact that the manufacturer has sold or intends to sell the specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

Section 24. Subsidy of Licensees.—No manufacturer shall pay or give or contract to pay or give any thing or service of value to any licensee in this state, and no licensee in this state shall accept or receive or contract or agree to accept or receive, directly or indirectly, any payment, thing or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service of value by the manufacturer, or the acceptance or receipt thereof by the licensee, may be to lessen or eliminate competition or tend to create or create a monopoly in the licensee that accepts or receives the payment, thing or service of value or contracts or agrees to accept or receive the same.

Section 25. Rules and Regulations.—The department shall have authority from time to time to make, amend and rescind rules and regulations necessary to carry out and enforce the provisions of this act, including rules and regulations governing the business done in this state by licensees, the content of reports required from licensees and the manner and extent of examinations made of the business of licensees. Among other things, the department shall have authority to prescribe forms in which required information shall be set forth, items or details to be shown in balance sheets and earning statements and methods to be fol-

lowed in the preparation of accounts necessary to reflect factors in the business of the licensee to be reckoned with by the department when fixing a maximum finance charge on retail installment contracts. The rules and regulations of the department, other than those issued pursuant to the authority vested in the department by section 26 of this act, shall be published and be effective in the manner and at the time prescribed by the department. No provision of this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the department, notwithstanding that the rule or regulation may, after the act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Section 26. Classification of Retail Contract and Variable Finance Charges.—It shall be the duty of the department and the department shall have power, jurisdiction and authority to investigate retail installment contracts and ascertain the facts with reference to retail installment sales and upon the basis of the ascertained facts:

(a) to classify, by general order, retail installment sales or retail installment contracts arising therefrom, according to such system of differentiation as may reasonably distinguish the classes of retail installment sales or the contracts made in connection with such sales, and,

(b) to determine and fix by a general order the fair maximum finance charge that may be contracted for in any retail installment contracts or that may be contracted for in retail installment contracts of any classes which may be established by the department, and

(c) to determine and fix by a general order the fair maximum charges that may be contracted for in any retail installment contract and which may be imposed upon the retail buyer for failure to pay any installment of the time balance when it is due.

[fol. 18] The department, in determining the classes of retail installment sales or contracts, shall take into consideration the specific goods sold thereunder, the use thereof, the length of time usually given to the retail buyer in which to pay the unpaid balance owing on any retail installment contracts made in connection with the sales and

any other factors which may reasonably afford a basis for the application of different finance charges on retail installment contracts which have or are likely to have the same or substantially the same unpaid balances.

The department, in determining the fair maximum finance charge which may be contracted for in any retail installment contracts or in any retail installment contracts of any classes which may have been established by it, shall take into consideration the availability of credit facilities to individuals who do not have the security generally required by commercial banks and the finance charge which will be necessary in order to induce sufficient amounts of efficiently operated commercial capital to enter into the business of making and purchasing retail installment contracts. The department shall fix charges sufficient to provide adequate credit facilities for retail installment sales.

The department may, from time to time, upon the basis of changed conditions or facts, reclassify retail installment sales and retail installment contracts, and redetermine and refix any maximum finance charge previously fixed by it, but the new finance charge shall not affect pre-existing retail installment contracts lawfully made. Any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges shall fix the effective date of the new or changed classification or finance charge but the effective date shall not be earlier than thirty days after the date when notice of such new or changed classification or finance charge is published. Notice to the public, to retail sellers and to licensees hereunder shall be given by publication of the new or changed classification or finance charge by one publication in a daily newspaper of general circulation printed and published in the English language in the city of Indianapolis. In addition, the department may require licensees hereunder to give notice of such new or changed classification or finance charge to all retail sellers with whom the licensees do business in this state.

Any finance charge fixed by the department under the provisions of this act shall be lawful notwithstanding any other law of this state.

Section 27. Duty of Retail Seller and Licensee.—Every person to which this act is applicable shall conduct and transact his business in the manner required hereby and

every licensee hereunder shall establish and maintain methods for the conduct of his business and affairs coming within the scope of this act in accordance with the requirements hereof and of any rule or regulation of the department made in relation thereto and under the authority of this act.

Section 28. Waiver of Statutory Protection.—No agreement of any retail buyer before or at the time of the making of any retail installment contract shall constitute a valid waiver of any provisions of this act.

Section 29. Violation of Act.—Punishment.—Any person who wilfully violates any of the provisions of this act, or the rules and regulations promulgated by the department under the authority hereof or any person who wilfully in any report or account filed in pursuance of any provision of this act or rule or regulation of the department makes any untrue statement of a material fact or omits to state any material fact necessary to give the department the information lawfully required by it, shall upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year or both.

Section 30. Interpretation.—This act shall be interpreted and construed in connection with and as supplemental to the Uniform Sales Act, as amended, and the Uniform Conditional Sales Act and any terms used in this act which are defined in either of said acts shall have the meaning given thereto by the aforementioned acts unless the context hereof clearly requires another meaning. Nothing in this act shall be construed to repeal any part of either of the acts mentioned in this section or any existing law of this state relating to interest or consideration that may be charged upon the loan, use or forbearance of money or sale of credit, but this act shall be construed as supplemental thereto.

[fols. 19 & 20] Section 31. Existing Contracts.—None of the provisions of this act shall apply to any sale or to any contract to sell made prior to the taking effect of this act which if made after this act takes effect would be a retail installment sale or contract and this act shall not affect pending litigation.

Section 32. Captions.—No caption of any section of this act shall in any way affect interpretation of this act or any part thereof.

Section 33. Severability Clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section 34. Short Title.—This act may be cited as the Retail Installment Sales Act.

Section 35. Time of Taking Effect.—This act shall take effect on the first day of July, 1935.

[fol. 21] In United States District Court

Subpœna—Issued June 22, 1935

The President of the United States of America to Paul V. McNutt, Governor of the State of Indiana; Philip Lutz, Attorney General of Indiana; Richard A. McKinley, Director of the Department of Financial Institutions of the State of Indiana; Oscar P. Welborn, Harvey B. Hartsock, C. M. Setser, Myron Gray and Robert Batton, Members of the Commission for Financial Institutions of the State of Indiana; Herbert M. Spencer, Prosecuting Attorney for the Nineteenth Judicial Circuit of The State of Indiana, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the Southern Dist. of Indiana, at Indianapolis, to answer unto the bill of complaint of General Motors Acceptance Corporation of Indiana, Incorporated, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Robert C. Baltzell, United States District Judge at Indianapolis, this 22nd day of June, A. D. 1935.

Albert C. Sogemeier, Clerk, by Essa Phillips, Deputy Clerk. (Seal.)

Memorandum

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

[fol. 22] United States Marshal's Return

(Endorsed on back of Subpœna in Equity)

No. 1686 Eq.

Received this writ at Indianapolis, Indiana, June 24, 1935, and served the same, by reading the same to and within the hearing of, and by delivering a true copy of this writ to each of the within named, Paul V. McNutt, Governor of the State of Indiana, Philip Lutz, Jr., Attorney General of Indiana; Richard A. McKinley, Director of the Department of Financial Insititutions of State of Indiana; Oscar P. Welborn, Harvey B. Hartsock, members of the Commission of Financial Institutions of the State of Indiana; and Herbert M. Spencer, prosecuting attorney of the 19th Judicial Circuit of State of Indiana; all at Indianapolis, Indiana, June 24, 1935.

Alf O. Meloy, U. S. Marshal, by Harry E. Gates, Deputy.

Marshal's Costs;
6 Services, $12.00.

Received this writ at Indianapolis, Indiana, June 24, 1935, and served the same, by reading the same to and within the hearing of, and by delivering a true copy of this writ to each of the within named C. M. Setser, at Columbus, Ind., June 24, 1935, and Myron Gray, at Muncie, Ind., June 25, 1935, being members of the Commission of Financial Institutions of the State of Indiana. The within named Robert Batton not found in my district.

Alf O. Meloy, U. S. Marshal, by Frank A. Holmes, Deputy.

Marshal's Costs:

2 Services	$4.00
Mileage	5.70
	$9.70

[fol. 23] And afterwards to wit: at the May Term of said Court on the 28th day of June, 1935, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Comes now the defendant Herbert M. Spencer, Prosecuting Attorney, by Albert M. Thayer, his solicitor, and files appearance, which is as follows: (H. I.)

[fol. 24] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF JUDGE

Public business requiring, I hereby designate and assign the Honorable Thomas W. Slick, United States District Judge for the Northern District of Indiana, to hold United States District Court in the Southern District of Indiana from July 1, 1935 to October 1, 1935, and for such further time as may be necessary to complete unfinished business.

Evan A. Evans, Senior United States Circuit Judge
in and for the Seventh Judicial Circuit.

Chicago, Illinois, June 11, 1935.

[fols. 25 & 26] IN UNITED STATES DISTRICT COURT

ENTRY OF CONTINUANCE—July 3, 1935

This matter coming on now to be heard upon the plaintiff's application for interlocutory injunction and the Court now continues this matter to July 8, 1935, 9:00 o'clock, A. M., daylight savings time.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL ANSWERS OF DEFENDANTS—Filed July 8, 1935

The defendants, Paul V. McNutt, Governor of the State of Indiana, Philip Lutz, Attorney General of Indiana, Richard A. McKinley, Director of the Department of Financial Institutions of the State of Indiana, Oscar P. Welborn,

[fol. 28] Harvey B. Hartsock, C. M. Setzer, Myron Gray and Robert Batton, Members of the Commission for Financial Institutions of the State of Indiana, and Herbert M. Spencer, Prosecuting Attorney for the Nineteenth Judicial Circuit of the State of Indiana, for their joint and several answers to the bill of complaint filed herein by General Motors Acceptance Corporation of Indiana, Incorporated, allege and say:

I

Said defendants admit so much of subdivision First of the bill of complaint herein as alleges that the complainant, General Motors Acceptance Corporation of Indiana, Incorporated is a corporation duly organized and existing under the General Corporation Act of the State of Indiana and that said complainant is a citizen and resident of the State of Indiana and has its principal place of business in the City of Indianapolis, County of Marion and State of Indiana, and that said complainant has the power under its charter to buy contract obligations.

Said defendants further admit so much of subdivision First of complainant's bill of complaint as alleges that the defendant, Paul V. McNutt, is the duly elected, qualified and acting Governor of the State of Indiana and is a resident of the City of Indianapolis in the Southern District of said State; that the defendant, Philip Lutz, is the duly elected, qualified and acting Attorney General of the State of Indiana and is a resident in the Southern District of said state; and that the defendant, Richard A. McKinley is the duly appointed Director of the Department of Financial [fol. 29] Institutions of the State of Indiana and is a resident of the City of Jeffersonville in the Southern District of the State of Indiana.

Said defendants further admit so much of said sub-division First of the bill of complaint as alleges that Oscar P. Welborn, Harvey B. Hartsock, C. M. Setser, Myron Gray and Robert Batton are the duly appointed members of the Commission for Financial Institutions of the State of Indiana. That the said Welborn and Hartsock reside at Indianapolis in the Southern District of said state; that the said Setser resides at Columbus in the Southern District of said state; and that the said Gray and Batton reside respectively at Muncie and Marion in the Northern District of said state.

Said defendants further admit so much of said subdivision First of the bill of complaint as alleges that defendant Herbert M. Spencer is the duly elected, qualified and acting Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana wherein complainant's principal place of business is situated and that said Spencer resides at Indianapolis in the Southern District of Indiana.

II

Said defendants admit so much of subdivision Second of the bill of complaint herein as alleges that the action is a suit of a civil nature but denies that said action arises under the Constitution and laws of the United States and that the matter in controversy exceeds the sum of three thousand dollars ($3,000) in value exclusive of interest and costs.

[fol. 30]

III

Said defendants admit so much of subdivision Third of the bill of complaint herein as alleges that General Motors Acceptance Corporation of Indiana, Incorporated is now and for a number of years last past has been engaged in the business of purchasing retail installment sales contracts covering products manufactured by General Motors Corporation or its divisions and sold by dealers and that most of these retail installment sales contracts involve purchases where the cash price would be less than fifteen hundred dollars ($1500) and that in all of them said complainant obtains by purchase and assignment thereof a security interest in the goods sold.

IV

The defendants admit so much of subdivision Fourth of the bill of complaint herein as alleges that complainant under arrangements with retail sellers has for years purchased and desires to continue to purchase retail installment contracts at such prices and on such terms and conditions as may from time to time be agreed upon by them and that the business relation now existing between the said complainant and a large number of retail sellers engaged in the business of selling at retail new and used automobiles and other General Motors' products in the State of Indiana is mutually of great business advantage and value.

Further answering said subdivision Fourth of the bill of complaint herein said defendants allege that the arrangements with retail sellers therein referred to is a [fol. 31] method employed by the complainant and said retail sellers for the extension of credit to buyers of said products referred to in the complaint whereby, among other things, a charge is made to be paid by the buyer of said products for the credit extended and for the loan or the forbearance of money, goods, wares or merchandise and that the business of said complainant in relation thereto is the financing for and on behalf of said retail sellers of the merchandise sold by said retail sellers on credit; that under the arrangements referred to by complainant between it and the retail sellers, complainant furnishes retail sellers with rate charts, forms of contracts and material designed to facilitate the extension of credit to the retail buyer and the retail seller has no part in the determination of the costs of such credit extension.

V

Said defendants admit so much of subdivision Fifth of the bill of complaint herein as alleges that by act approved by the Governor of the State of Indiana on March 11, 1935, Chapter 231 of the Acts of the General Assembly of Indiana of 1935 became a law and that this law is entitled "An Act to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such contracts, to empower the department of financial institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales," and that said act became effective from and after the 1st day of July 1935 and [fol. 32] that the copy of said act attached to the bill of complaint herein is a correct copy thereof.

VI

The defendants deny so much of subdivision Sixth of the bill of complaint herein as alleges that said Chapter 231 of the Acts of the General Assembly of 1935 is unconstitutional and void in that its enforcement would deprive complainant of its property without due process of law and

deny to it equal protection of the laws in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States by illegally delegating to the Department for Financial Institutions legislative powers in violation of Section 1 of Article III of the Constitution of the State of Indiana and by arbitrarily, unreasonably and unjustifiably regulating and controlling the business and affairs of the complainant and fixing the term and price at which and the manner in which retail sellers may sell and conduct their sale of automobiles and other General Motors' products at time price payable in installments and the manner, terms and price in and at which retail sellers may sell and complainant may purchase the installment sale contracts arising from such sales.

Said defendants further answering said subdivision Sixth of the bill of complaint herein allege that said act is not unconstitutional and void and that its enforcement will not deprive complainant of its property without due process of law nor deny to it the equal protection of the laws as alleged in said bill of complaint but said defendants further allege that said business is affected with such a public interest as to justify regulation in the interest of the public welfare and that the provisions of said act are not arbi- [fol. 33] trary, unreasonably and unjustifiable.

VII

The said defendants in answer to subdivision Seventh of the complaint herein allege and say that said subdivision purports to state the sections by number upon which the complainant relies and purports to state an interpretation of said sections; that said interpretations are not full and complete and to that extent are misleading and insufficient but defendants allege that under a proper construction of said act said sections do not deny to the complainant the equal protection of the laws nor do they deprive the complainant of due process of law. That said act is for the purpose of the regulation under the police power of the state of the business of retail installment selling particularly with reference to the finance charge for such services and that the methods set out in said sections and the classifications referred to in said sections are reasonably adapted to the exercise of such police power and are not arbitrary, unreasonable or unjustifiable.

VIII

Answering complainant's subdivision Eighth the defendants admit the allegations thereof and allege further that since the filing of this complaint the department has promulgated the said regulations hereto attached and hereof made a part marked exhibit A and said defendants admit that they will in so far as required by said act in their respective capacities enforce the same in all of its provi- [fol. 34] sions unless restrained by the Court.

IX

Defendants answering subdivision Ninth of the complainant's bill of complaint say that they are not advised as to the matters therein contained and alleged and therefore said defendants neither admit nor deny the allegations of said subdivision Ninth aforesaid.

X

Answering subdivision Tenth of the bill of complaint herein the defendants deny so much of said subdivision Tenth as alleges that the enforcement of the act and especially the provisions therein set out will result in irreparable damage and injury to the complainant and its business and deny so much of said subdivision as alleges that the enforcement of said act will work continued irreparable damage upon the business of the complainant by creating uncertainty which will impair the efficiency of its operation and its earnings and by rendering hazardous any future commitments and any contracts extending over definitive periods of time for the purchase of retail installment contracts, the determination of its borrowing requirements and the obtaining of capital required in the conduct of its business.

XI

The defendants deny so much of said subdivision Eleventh of the bill of complaint herein as alleges that complainant is without adequate remedy at law in the premises and that it is only by the injunctive process of this court that such irreparable damage and injury can be avoided and complainant fully protected in the enjoyment of its property [fol. 35] and rights, and said defendants allege that the

enforcement of said act will not produce irreparable damage and injury.

XII

Said defendants answering further the bill of complaint in said cause say:

1. That the court is without jurisdiction, less than three thousand dollars being involved in the controversy herein and no federal question being sufficiently stated therein.

2. That the Act of the General Assembly of Indiana complained of is constitutional and valid and that complainant is not deprived of due process of law or the equal protection of the laws by said act.

Wherefore said defendants pray that said bill of complaint be dismissed and that the relief therein prayed for be denied.

Philip Lutz, Jr., Attorney General; Fred A. Winking, Chief Assistant Attorney General; Joseph W. Hutchison, Assistant Attorney General, Attorneys for Defendants. Leo M. Gardner, of Counsel.

[fol. 36] EXHIBIT "A" TO ANSWERS

State of Indiana

The Department of Financial Institutions

Retail Installment Sales Act

General Order No. 1

Pursuant to the power and authority vested in it under Chapter 231 of the Acts of the General Assembly of the State of Indiana for the Year of 1935, which Chapter was approved on March 11, 1935, and became effective in its entirety on July 1, 1935, and is now in full force and effect.

The Department of Financial Institutions of the State of Indiana does hereby classify "Retail Installment Sales" and "Retail Installment Contracts" arising therefrom, and fix and determine the maximum finance charge that may be contracted for in each class, as follows:

Class I. Sales of New Merchandise, Excepting Commercial Motor Vehicles and Trucks, Under Retail Installment Contracts Having a Principal Balance of $100.00 or less

It is hereby found and ordered that retail installment sales of New Merchandise, excepting commercial motor vehicles and trucks, under retail installment contracts, having a principal balance of $100.00 or less, are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class I; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class I is two per cent. (2%) of the principal balance of said contract, plus an amount equal to simple interest at the rate of two and one-half per cent. (2½%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said two per cent (2%) of the principal balance above mentioned and then in reduction of the principal balance; provided, however, that the maximum finance charge in any sale or contract of this Class shall not be less than ten per cent. (10%) of the principal balance of such contract for each year and/or fraction of year that any part of the principal balance is contracted to remain unpaid.

[fol. 37] Class II. Sales of New Commercial Motor Vehicles and Trucks under Retail Installment Contracts Having a Principal Balance of $100.00 or Less

It is hereby found and ordered that retail installment sales of new commercial motor vehicles and trucks under retail installment contracts, having a principal balance of $100.00 or less, are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class II; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class II is one per cent (1%) of the cash price of the specific goods as recited in

such contract, plus two per cent (2%) of the principal balance as set forth in said contract, plus an amount equal to simple interest at the rate of two and one-half per cent (2½%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said one per cent (1%) of the cash price of the specific goods and said two per cent of the principal balance of said contract and then in the reduction of the principal balance; provided, however, that the maximum finance charge in any sale or contract of this Class shall not be less than ten per cent (10%) of the principal balance of such contract for each year and/or fraction of year that any part of the principal balance is contracted to remain unpaid, plus one per cent (1%) of the cash price of the specific goods as recited in such contract.

Class III. Sales of New Merchandise, Excepting Commercial Motor Vehicles and Trucks under Retail Installment Contracts Having a Principal Balance of Over $100.00

It is hereby found and ordered that retail installment contracts of new merchandise, excepting commercial motor vehicles and trucks, under retail installment contracts having a principal balance of over $100.00 are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class III; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class III is two per cent (2%) of the principal balance of said contract, plus an amount equal to simple interest at the rate of two per cent (2%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is con-
[fol. 38] tracted to be paid, and the remainder of each payment is applied first to the payment of said two per cent (2%) of the principal balance and then in reduction of the principal balance.

Class IV. Sales of New Commercial Motor Vehicles and Trucks under Retail Installment Contracts Having a Principal Balance of Over $100.00

It is hereby found and ordered that retail installment sales of new commercial motor vehicles and trucks under retail installment contracts having a principal balance of over $100.00 are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class IV; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class IV is one per cent (1%) of the cash price of the specific goods as recited in such contract, plus two per cent (2%) of the principal balance of said contract, plus an amount equal to simple interest at the rate of two per cent (2%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said one per cent (1%) of the cash price of the specific goods and said two per cent (2%) of the principal balance of said contract and then in reduction of the principal balance.

Class V. Sales of Used Merchandise, Excepting Commercial Motor Vehicles and Trucks, under Retail Installment Contracts Having a Principal Balance of $300.00 or Less.

It is hereby found and ordered that retail installment sales of used merchandise, excepting commercial motor vehicles and trucks, under retail installment contracts, having a principal balance of $300.00 or less, are a separate and distinct class of retail instalment sales and retail installment contracts, which for the purpose of identification, are hereby designated as Class V; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class V is five per cent (5%) of the principal balance of said contract, plus an amount equal to simple interest at the rate of three per cent (3%) per month, computed on the declining principal balances as if the buyer paid the time balance in the

installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said five per cent (5%) of the principal balance and then in reduction of the principal balance; provided, however, that the maximum finance charge in [fol. 39] any sale or contract of this Class shall not be less than—

$10.00 if the principal balance is $50.00 or less;
13.00 if the principal balance is more than $50.00 and does not exceed $70.00;
16.50 if the principal balance is more than $70.00 and does not exceed $90.00;
20.00 if the principal balance exceeds $90.00;

plus, in each instance, five per cent. (5%) of the principal balance first above mentioned.

Class VI. Sales of Used Commercial Motor Vehicles and Trucks Under Retail Installment Contracts Having a Principal Balance of $300.00 or Less

It is hereby found and ordered that retail installment sales of used commercial motor vehicles and trucks under retail installment contracts having a principal balance of $300.00 or less are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class VI; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class VI is one per cent. (1%) of the cash price of the specific goods as recited in such contract, plus five per cent. (5%) of the principal balance as set forth in said contract, plus an amount equal to simple interest at the rate of three per cent (3%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said one per cent (1%) of the cash price of the specific goods and said five per cent (5%) of the prin-

cipal balance of said contract and then in the reduction of the principal balance; provided, however, that the maximum finance charge in any sale or contract of this Class shall not be less than—

$10.00 if the principal balance is $50.00 or less;
13.00 if the principal balance is more than $50.00 and does not exceed $70.00;

[fol. 40]

16.50 if the principal balance is more than $70.00 and does not exceed $90.00;
20.00 if the principal balance exceeds $90.00;

plus, in each instance, one per cent. (1%) of the cash price of the specific goods as recited in such contract, and five per cent (5%) of the principal balance as set forth in said contract.

Class VII. Sales of Used Merchandise, Excepting Commercial Motor Vehicles and Trucks, Under Retail Installment Contracts Having a Principal Balance of Over $300.00

It is hereby found and ordered that retail installment contracts of used merchandise, excepting commercial motor vehicles and trucks, under retail installment contracts having a principal balance of over $300.00 are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class VII; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class VII is five per cent. (5%) of the principal balance of said contract, plus an amount equal to simple interest at the rate of two and one-half per cent. (2½%) per month, computed on the declining principal balance as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said five per cent (5%) of said principal balance of said contract and then in reduction of said principal balance; provided, however, that the maximum finance

charge in any sale or contract of this Class shall not be less than $20.00.

Class VIII. Sales of Used Commercial Motor Vehicles and Trucks Under Retail Installment Contracts Having a Principal Balance of Over $300.00

It is hereby found and ordered that retail installment sales of used commercial motor vehicles and trucks under retail installment contracts having a principal balance of over $300.00 are a separate and distinct class of retail installment sales and retail installment contracts which, for the purpose of identification, are hereby designated as Class VIII; and it is hereby fixed and determined that the maximum finance charge that may be contracted for in any retail installment sale or contract of said Class VIII is one [fol. 41] per cent (1%) of the cash price of the specific goods as recited in such contract, plus five per cent. (5%) of the principal balance as set forth in said contract, plus an amount equal to simple interest at the rate of two and one-half per cent. (2½%) per month, computed on the declining principal balances as if the buyer paid the time balance in the installments and at the times contracted, and as if so much of each payment is applied to the payment of such interest as will pay the same to the date such payment is contracted to be paid, and the remainder of each payment is applied first to the payment of said one per cent (1%) of the cash price of the specific goods and said five per cent (5%) of the principal balance of said contract and then in reduction of the principal balance; provided, however, that the maximum finance charge in any sale or contract of this Class shall not be less than $20.00.

Dealer's Participation in Finance Charge

It is hereby ordered, fixed and determined that no licensee under said Chapter 231 of The Acts of the General Assembly of the State of Indiana for 1935, shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of two per cent. (2%) of

the principal balance as used in Item (5) under Section 4 of said Act, in the case of retail installment contracts of Classes I, II, III and IV, as established by this order, and five per cent. (5%) of the principal balance as used in Item (5) under Section 4 of said Act, in the case of retail installment contracts of Classes V, VI, VII and VIII, as established by this order, and no licensee shall, directly or indirectly, pay any part of the amount collected as a finance charge, or retail buyer's cost of insurance, to any retail seller on any retail installment contract purchased from him, in excess of said amounts herein fixed.

Maximu n Delinquent Fees

It is hereby ordered, fixed and determined that no retail seller may contract, at the time of the making of any retail installment contract, for the payment by the retail buyer of delinquent charges for failure to pay any installment of the time balance on the date specified in the retail installment contract, or collect or receive any such delinquent charges in excess of—

$.15 on payment of a less amount than $15.00 and
.25 on payments of $15.00 and over which are delinquent more than 2 days but not more than 7 days;

[fol. 42]

$.25 on payments of a less amount than $15.00 and
.50 on payments of $15.00 and over which are delinquent more than 7 days but not more than 11 days;
$.40 on payments of less amount than $15.00 and
.75 on payments of $15.00 and over which are delinquent more than 11 days but not more than 24 days;
$.50 on payments of less amount than $15.00 and
1.00 on payments of $15.00 and over which are delinquent more than 24 days;

plus, in each instance, the actual expenses which the holder of the retail installment contract has in connection with making the collection of such installment in excess of the amount herein above set forth; and plus, also, a finance charge equal to simple interest at the rate of—

2½% per month on contracts of Classes I and II;
2% per month on contracts of Classes III and IV;
3% per month on contracts of Classes V and VI;
2½% per month on contracts of Classes VII and VIII

for the actual number of days each such installment remains delinquent or is extended by the agreement of the parties;

Provided, also, that the holder of the retail installment contract shall keep at all times with the record of such account a verified statement of the actual expenses charged to the retail buyer in connection with making any collection of a delinquent installment or installments as herein authorized.

Minimum Discount for Prepayment

It is hereby ordered, fixed and determined that each retail buyer who pays the full unpaid time balance of his retail installment contract at or before the time the installment thereof preceding the last installment is due, shall receive a discount from such time balance equal to interest at the rate of one per cent. (1%) per month on each installment so prepaid for the respective full install- [fol. 43] ment period or periods that each such installment or installments are paid prior to being due by the terms of the contract; provided, however, that if the retail installment contract included a finance charge of less than one per cent. (1%) per month when calculated on declining principal balances, as that part of the maximum finance charges based on simple interest is provided to be computed in this order, then the discount shall not be less than interest computed at the rate of the finance charge as so calculated, computed in the manner in this paragraph provided.

This general order shall be in full force and effect on and after 12 o'clock midnight, August 2-3, 1935.

In witness whereof, The Department of Financial Institutions has caused this general order to be executed by its director and sealed with the seal of the department at Indianapolis in the State of Indiana this 2nd day of July, 1935.

The Department of Financial Institutions of the State of Indiana, by R. A. McKinley, Director.

Attest: H. B. Wells, Secretary, Commission for Financial Institutions.

[fol. 44] IN UNITED STATES DISTRICT COURT

ENTRY OF FILING AFFIDAVITS, ETC.—July 8, 1935

And the defendants also file affidavit No. 2 of Herman B. Wells and Edward A. Edwards, which affidavits are as follows: (H. I.)

Also file affidavit of Clarence A. Budd, which is as follows: (H. I.)

The hearing on the plaintiff's application for interlocutory injunction is extended to September 16, 1935 or until further order of this Court.

[fol. 45] ENTRY—Oct. 1, 1935

Comes now the plaintiff, by its solicitors, and files second affidavit of Milan V. Ayres, which is as follows: (H. I.)

[fol. 46] IN UNITED STATES DISTRICT COURT

ENTRY OF FILING FINDINGS OF FACT AND CONCLUSIONS OF LAW—Oct. 2, 1935

This cause having come on to be heard and the parties having appeared by their respective counsel and offered evidence in support of their respective contentions and the court having heard the arguments of counsel and being now fully advised in the premises makes and files as a part of the record in said cause its findings of fact and states its conclusions of law thereon in the words and figures following:

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Oct. 2, 1935

1

General Motors Acceptance Corporation of Indiana, Inc., complainant herein, is a stock corporation which was

organized in 1929 under the Indiana General Corporation Act to buy and deal in contract obligations and similar choses in action. Unless otherwise indicated herein, said corporation will be hereinafter referred to as G. M. A. C. The principal office and place of business of G. M. A. C. are in the City of Indianapolis, State of Indiana, and a branch is maintained in each of the cities of Ft. Wayne and [fol. 48] South Bend, in the State of Indiana. G. M. A. C. succeeded, upon its organization, to the Indiana assets and business of General Motors Acceptance Corporation of New York which, since 1925, had been engaged in Indiana in the same business as is now conducted by G. M. A. C.

The defendant, Paul V. McNutt, is the duly elected, qualified and acting Governor of the State of Indiana, and is a resident of the City of Indianapolis, in the Southern District of said state.

The defendant, Philip Lutz, is the duly elected, qualified and acting Attorney General of the State of Indiana, and is a resident of the City of Indianapolis in the Southern District thereof.

The defendant, Richard A. McKinley, is the duly appointed Director of The Department of Financial Institutions of the State of Indiana, and is a resident of the City of Jeffersonville in the Southern District thereof.

The defendants, Oscar P. Welborn, Harvey B. Hartsock, C. M. Setser, Myron Gray and Robert Batton, are the duly appointed members of the Commission for Financial Institutions of said State, the said Welborn and Hartsock residing at Indianapolis, in the Southern District thereof, the said Setser residing at Columbus in the Southern District thereof, the said Gray and Batton residing respectively at Muncie and Marion in the Northern District thereof.

The defendant, Herbert M. Spencer, is the duly elected, qualified and acting Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana, wherein complainant's principal place of business is situate, and [fol. 49] resides at Indianapolis in the Southern District of Indiana.

General Motors Corporation is a corporation engaged in manufacturing many and diverse products, including automobiles, electric refrigerators and the like.

2

G. M. A. C.'s business is exclusively with retail sellers appointed by General Motors Corporations or any of its divisions for the retail sales of the products manufactured by General Motors Corporation. G. M. A. C. does business with approximately 500 such retail sellers in Indiana. A majority of the retail sellers with whom it does business are retail sellers of automobiles, and the remaining retail sellers sell either electric refrigerators or electric heating equipment or appliances such as vacuum cleaners which are manufactured by General Motors Corporation. Sometimes herein retail sellers will be referred to as dealers and the terms are used interchangeably.

3

G. M. A. C.'s business consists of purchasing from such dealers contracts covering retail sale and purchase on the instalment plan of automobiles and other General Motors products. Most of the instalment sale contracts purchased by G. M. A. C. from dealers involve purchases where the cash price would be less than $1500.00 and they provide for the retention of a security interest in the goods sold.

4

G. M. A. C. buys instalment sale contracts from the dealers after they have sold goods and consummated the time [fol. 50] sale transactions represented by the conditional sale contracts executed by the dealers and the retail buyers. G. M. A. C. has no dealings or relations with any retail buyers of cars or other General Motors products until after it has purchased the retail instalment sale contract from the dealer. It then proceeds, as assignee and purchaser thereof, to collect from the retail buyer the unpaid balance of the time sale price according to the terms and provisions of the retail contract acquired by it.

5

A dealer or retail seller is under no compulsion or obligation, contractual or otherwise, to sell or offer to sell instalment sale contracts to G. M. A. C., nor is the latter obligated to buy any. Dealers with whom it does business are free, as best suits their own interests, either to

hold and handle such contracts themselves or to sell them to G. M. A. C. or to some other company in the same or similar business as G. M. A. C., or otherwise dispose of or deal with them. Not all General Motors dealers in Indiana sell their instalment sale contracts to G. M. A. C., and those dealers which do business with G. M. A. C. do not sell all of their contracts to it. By the same token, G. M. A. C. does not purchase all the retail instalment sale contracts offered to it by dealers for purchase.

A retail seller appointed by General Motors Corporation to sell its manufactured products is always free to make such terms with retail buyers as the retail seller desires, but G. M. A. C. may refuse, and from time to time has [fol. 51] refused, to purchase contracts from retail sellers as unacceptable on the ground, for example, that the contract offered to it for purchase does not evidence an initial down payment by the retail buyer to the retail seller sufficient to vest the retail buyer with a substantial paid-in interest in the goods, and that information concerning his financial position does not demonstrate sufficient ability on his part to pay the instalments of the price and support the purchase of the goods.

6

The arrangements under which G. M. A. C. does business with dealers is that such purchases of retail instalment contracts as it makes from them are subject to and governed by the terms and conditions of the G. M. A. C. retail plan, a copy of which is supplied to each dealer interested in offering such contracts for purchase.

The G. M. A. C. retail plan is the name given by complainant to describe the business of purchasing retail instalment contracts from retail sellers covering sales made to customers, in which the terms, time prices and credit standing of the customer are satisfactory to G. M. A. C. Under this plan both new and used car instalment contracts are purchased.

The G. M. A. C. retail plan not only includes the terms and conditions, restrictions and limitations under which the retail instalment contracts are purchased from dealers and the relative rights of the parties in the transaction, but also suggests the statesmanship procedure to be used in negotiating instalment sales, the manner in which the sales

should be closed, the use of the payment charts, the investi-
[fol. 52] gation of the customer's credit statement, and the manner in which the contract arising out of the retail instalment sale may be sold to G. M. A. C.

Under the G. M. A. C. retail plan the retail seller, in the event he or it desires to submit the retail instalment contract to G. M. A. C. for purchase, assigns and guarantees the retail instalment contract to G. M. A. C. in accordance with the terms of an assignment and guaranty printed on the contract supplied to the retail seller by G. M. A. C. This form is designated on the contract as "Dealer's Recommendation, Assignment and Guaranty". In the event the terms of the contract and other matters relating thereto are satisfactory to G. M. A. C., the contract will be purchased by it at a price agreed upon by the parties, usually an amount equal to the unpaid balance owing on the contract less the differential which has been added in accordance with the time payment charts supplied by G. M. A. C.

The assignment and guaranty are modified as to the retail seller's liability in accordance with the terms of the G. M. A. C. retail plan relating to dealer protection and reserve. Under the terms of the plan relating to dealer protection and reserve, the retail seller will be protected against liability or loss, as the case may be, on contracts purchased by G. M. A. C. subject to the following terms and conditions:

(1) G. M. A. C. agrees that the dealer will be relieved of responsibility on his guaranty in any instance where the repossessed car is not returned to the dealer.

(2) G. M. A. C. agrees that the dealer will be relieved of his responsibility on his guaranty in the event of conversion
[fol. 53] or embezzlement of cars by customers, such conversion to be existent when (a) it is determined that a car has been wrongfully sold, mortgaged, converted or embezzled, or (b) that a car can not be located and returned to the retail seller within ninety days after the date of default by the customer.

(3) G. M. A. C. agrees that the dealer will be relieved of his responsibility on his guaranty in the event cars are confiscated by Federal, state or municipal authorities and

the cars are not recovered and returned to the dealer within ninety days after default by the customer.

(4) G. M. A. C. agrees that the dealer will be relieved of his responsibility on his guaranty, in the instances hereinafter detailed, to the extent of collision losses suffered wherever repossession occurs as a direct result of a proven collision and when the re-sale value of the car after collision is less than the unpaid balance on the retail instalment contract. This protection is given (a) on used cars with unpaid balances less than $130 where specific collision insurance has not been provided the customer and dealer, (b) on those transactions where collision insurance may have been waived on agreement with the G. M. A. C. branch, (c) on losses which may arise from the deductible under the specific collision insurance.

G. M. A. C. during all times herein mentioned provided the retail sellers appointed by General Motors Corporation with forms of retail instalment contracts known as "Conditional Sale Contract" to be used by such retail sellers in instalment sales, which form is as follows:

(Here follows 1 photo, side folio 54.)

ORIGINAL

CONDITIONAL SALE CONTRACT

Contract Number _____

The undersigned seller hereby sells, and the undersigned purchaser or purchasers, jointly and severally hereby purchase(s), subject to the terms and conditions hereinafter set forth, the following property, complete with standard attachments and equipment, delivery and acceptance of which is hereby acknowledged by purchaser, viz:

	New or Used	Year Model	No. Cyl.	Make Trade Name	Type of Body If Truck, Give Tonnage	Model Letter or Number	Motor No.	Manufacturer's Serial No.
ONE								

RADIO—Make_____ Model_____ Serial No._____

For a **total time price** of $_____(9)_____, payable as follows: $_____(5)_____ **on or before delivery,** leaving a **deferred balance** of $_____(8)_____ payable at the offices of General Motors Acceptance Corporation of Indiana, Incorporated to be hereafter designated **in instalments of** $_____(7A)_____ on the same day of each successive month, or as indicated in schedule of instalments below, and commencing_____19____; and the final instalment payable hereunder shall equal the amount of the deferred balance remaining due. Interest is due on instalments after maturity at the highest lawful contract rate, and if this contract be placed with an attorney for collection, 15% of the amount due hereunder as attorney's fees, or if prohibited, the amount permitted by law.

Schedule for unequal monthly instalments

$_____1 Mo. hereafter
$_____2 Mos. hereafter
$_____3 Mos. hereafter
$_____4 Mos. hereafter
$_____5 Mos. hereafter
$_____6 Mos. hereafter
$_____7 Mos. hereafter
$_____8 Mos. hereafter
$_____9 Mos. hereafter
$_____10 Mos. hereafter
$_____11 Mos. hereafter
$_____12 Mos. hereafter
$_____ _____
$_____ _____
$_____ _____
$_____ _____
$_____ _____
$_____ _____

1. Title to said property shall not pass to purchaser until said amount is fully paid in cash.
2. No transfer, renewal, extension or assignment of this contract or any interest thereunder, or loss, injury or destruction of said property shall release purchaser from his obligation hereunder; assignee shall be entitled to all the rights of seller.
3. In the event purchaser defaults on any payment due on this contrast or fails to comply with any condition of this contract or a proceeding in bankruptcy, receivership or insolvency be instituted against the purchaser or his property, or seller deems the property in danger of misuse or confiscation, the full amount shall be immediately due and payable; the seller's acceptance, after the full amount may have become immediately due and payable as hereinbefore provided, of any instalment or payment shall not be deemed to alter or affect the purchaser's obligations and/or the seller's rights hereunder with respect to any subsequent payments or default therein.
4. No warranties, expressed or implied, representations, promises or statements have been made by seller unless endorsed hereon in writing.
5. Purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly or for hire; shall not remove same from the state without permission of the holder of this contract; shall not transfer any interest in this contract or said property. Any sum of money paid by the seller in payment or discharge of taxes, liens and encumbrances on said property shall be secured by and under this contract. The proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, shall be applied toward the replacement of the property or payment of this obligation, at the option of seller. Seller may insure said property against fire and theft, or any accidental physical damage to the car to protect purchaser, seller or seller's assignee. Purchaser agrees to pay the premium upon demand and that on failure to do so, payment of said premium shall be secured by this contract.
6. Time is of the essence of this contract, and if purchaser default in complying with the terms hereof, or seller deems the property in danger of misuse or confiscation, seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto; and for this purpose seller may enter upon the premises where said property may be and remove same. Seller shall retain all payments made by the purchaser prior to repossession hereunder. Seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as seller may determine; seller may bid at any public sale. From proceeds of any such sale, seller shall deduct all expenses for retaking, repairing and selling such property, including a reasonable attorney's fee. The balance thereof shall be applied to amount due; any surplus shall be paid over to purchaser; in case of deficiency purchaser shall pay the same with interest. Seller may take possession of any other property in the above described motor vehicle at time of repossession and hold same temporarily for purchaser without liability on the part of seller.
7. Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently. Purchaser hereby waives the right to remove any legal action from the court originally acquiring jurisdiction and waives all homestead and other property exemption laws. Any provision of this contract prohibited by law of any state shall as to said state be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract.

Executed in triplicate, one copy of which was delivered to and retained by purchaser, **this**_____**day of**_____, **19**____
(Do not date on Sunday)

Purchaser Signs _____ (Purchaser's Signature) _____ (Title, if Company) _____ (Street) _____ (Town) _____ (State)

Seller Signs _____ (Seller's Signature) _____ (Title, if Company) _____ (Street) _____ (Town) _____ (State)

_____ (Witness) **SIGN IN INK** _____ (Witness)

DEALER'S RECOMMENDATION, ASSIGNMENT AND GUARANTY

TO GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED:

For value received, undersigned does hereby sell, assign and transfer to the General Motors Acceptance Corporation of Indiana, Inc., his, its or their right, title and interest in and to the within contract, herewith submitted for purchase by it, and the property covered thereby and authorizes said General Motors Acceptance Corporation of Indiana, Inc. to do every act and thing necessary to collect and discharge the same.

The undersigned certifies that said contract arose from the sale of the within described property, warranting that title to said property was at time of sale and is now vested in the undersigned free of all liens and encumbrances; that said property is as represented to the purchaser of said property by the undersigned and that statements made by the purchaser of said property on the statement form attached hereto are true to the best of the knowledge and belief of the undersigned.

In consideration of your purchase of the within contract, undersigned guarantees payment of the full amount remaining unpaid hereon, and covenants if default be made in payment of any instalment herein to pay the full amount then unpaid to General Motors Acceptance Corporation of Indiana, Inc. upon demand, except as otherwise provided by the terms of the present General Motors Acceptance Corporation of Indiana, Inc. Retail Plan. Liability of the undersigned shall not be affected by any settlement, extensions, variation of terms of the within contract effected with, or by the discharge or release of the obligation of, the purchaser or any other person interested, by operation of law or otherwise. Undersigned waives notice of acceptance of this guaranty and notices of non-payment and non-performance.

Seller Signs _____ (Seller's Signature) _____ (Title, if Company)

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50A

GUARANTY

In consideration of the making of the within contract by the dealer therein, the undersigned does hereby guarantee to said dealer, or any assignee, of said contract, payment of all deferred payments as specified therein and covenants in default of payment of any instalment or performance of any requirement thereof by purchaser to pay full amount remaining unpaid upon demand. The liability of the undersigned shall not be affected by any settlement, extensions, variation of terms of the within contract effected with, or by the discharge or release of the obligation of, the purchaser or any other person interested, by operation of law or otherwise. Notice of acceptance of this guaranty, notices of non-payment and non-performance, notices of amount of indebtedness outstanding at any time, protests, demands, and prosecution of collection, foreclosure and possessory remedies, and the right to remove any legal action from the court originally acquiring jurisdiction, are hereby expressly waived.

WITNESS:

_____

(Guarantor)

_____

(Address)

[fol. 55] Along with the form of contract supplied as in the preceding paragraph set forth, G. M. A. C. supplied the retail sellers with a form of work sheet which is as follows:

(Here follows 1 photo, side folio 56.)

...TED IN U.S.A.

SUBMIT CONTRACT AND THIS FORM TO GMAC

DEALER'S WORK SHEET

(DEALER FILLS IN BEFORE COMPLETING CONTRACT)

...RIPTION OF TRADE-IN:

...MODEL ... YEAR ...

...R NO. ... SERIAL NO. ...

...RACT HAS BEEN FILED OR RECORDED IN:

... ON ... 19 ...
CITY OR COUNTY TOWNSHIP MONTH DAY

... CAR BE USED FOR LIVERY AND RENTING . . . . . { YES ☐ NO ☐

...ED CAR—CAR WAS TAKEN IN T...DE FROM:

... NAME ... ADDRESS

... 19 ... IN THE SALE OF A GENERAL MOTORS CAR FOR WHICH ... WAS ALLOWED AND $ ... SPENT IN RECONDITIONING AS FOLLOWS:

... COMMERCIAL CAR—NATURE OF WORK IN WHICH CAR WILL BE USED ...

...RACT COVERS—

...CHASSIS ONLY ☐; CHASSIS AND CAB ☐; CHASSIS, CAB AND BODY ☐.

CASH DELIVERED PRICE . . . . . (1) $ ...

TERRITORY AMOUNT—CHART NO. ... (DO NOT FILL IN WHEN SIMPLIFIED CHART IS USED) . . . . . (2) $ ...

FILING OR RECORDING FEE . . . . . (3) $ ...

BASIC TIME PRICE (*Add 1, 2 and 3*) . . . . . (4) $ ...

DOWN PAYMENT $ ... (*Net Trade-In*) PLUS $ ... (*Actual Cash*) . . (5) $ ... ★

UNPAID BALANCE (*Subtract 5 from 4*) . . . . . (6) $ ...

TIME PRICE DIFFERENTIAL—CHART NO. ... . . (7) $ ...

AMOUNT OF CONTRACT (*Add 6 and 7*) . . . . . (8) $ ... ★

TOTAL TIME PRICE (*Add 5 and 8*) . . . . . (9) $ ... ★

COLLISION DEDUCTIBLE $ ... NO. OF MOS. ... INSTALMENTS $ ... ★

7A

EXTRA EQUIPMENT, IF ANY, INCLUDED IN ITEM 1.

RADIO $ ... OTHER EQUIPMENT $ ...

FILL IN RADIO SECTION OF CONTRACT

☞ *IMPORTANT—Copy the Four Figures Marked with ★ on Contract*

DEALER SIGNS ☞ ...

DATE ... 19 ... BY ... (TITLE, IF COMPANY)

FOR USE BY GMAC ONLY

PURCHASER GRADING

BEFORE INVESTIGATION	GMAC G	F	P
...CURRENT EARNINGS			
...PERMANENT EMPLOYMENT			
...RESERVE ASSETS			
...IF COMMERCIAL VEHICLE—EARNINGS			
...DOWN PAYMENTS—PURCHASER EQUITY			
...IF USED CAR—MARKET VALUE			
...DATES OF PAYMENTS CONFORMING WITH DATES AND AMOUNTS OF INCOME			
...FINAL GRADE			
AFTER INVESTIGATION			
...TRADE OPINIONS FOR REPUTATION MEETING OBLIGATIONS PROMPTLY			
...REPUTATION—CHARACTER			
...CONSENSUS OF OPINION—CHECKING AGENCIES			
...FINAL GRADE			

PREVIOUS PURCHASER EXPERIENCE CONTRACT NO.

CAR RELEASED

GUARANTOR

SIGNATURE O. K.

EXCESS BALANCE SHORT $

EXCESS TERMS NO. MOS.

MANAGEMENT APPROVAL FOR PURCHASE

AMOUNT OF CONTRACT . . . . . $ ...

DIFFERENTIAL . . . . . $ ...

RECORDING FEE . . . . . $ ... $ ... $ ...

DEDUCTION ACCT. NO. ... . $ ...

DEDUCTION ACCT. NO. ... . $ ...

CHECK NO. ... AND AMOUNT . . . . . $ ...

$ ... UNPAID BALANCE DIFFERENTIAL . . . . . $ ...

32-5 . . . . . $ ...

32-5 . . . . . $ ...

$ ... 32-5 REC. FEE . . . . . $ ...

$ ... 35-1 . . . . . $ ... $ ...

32-3 . . . . . $ ...

GMAC REMARKS

DEALER NO.	% D. P.	EST. VALUE	COLL.	TERM	DUE	IRREG.	CLASS & UNIT

PROOF OF PAYMENTS

PAYMENTS STARTING ...

/ ● —

● —

● —

● —

TOTAL $

GMAC APPROVAL FOR PURCHASE ... DATE ... 19

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MAC 130

CUSTOMER'S STATEMENT

MAKE OF CAR	MODEL	YEAR	NEW ☐	USED ☐	CASH DELIVERED PRICE . . . . $
DESCRIPTION OF TRADE-IN			MOTOR NO.		NET TRADE-IN ALLOWANCE $
MAKE	MODEL	YEAR	SERIAL NO.		CASH DOWN . . . . $
APD. INSURANCE ☐	NO. OF MONTHS		INSTALMENTS $		TOTAL DOWN PAYMENT . . . . $
DEALER	NAME		ADDRESS		UNPAID BALANCE . . . . $

CUSTOMER'S FULL NAME	FIRST	MIDDLE	SUR-NAME	DATE OF BIRTH	COLOR	MARRIED ☐ NO. OF DEPENDENTS
HOME ADDRESS	STREET	APT. NO.	CITY	COUNTY	LIVED AT ADDRESS HOW LONG.....YEARS.....MONTHS	PHONE NO.
IF RENTING NAME OF LANDLORD					ADDRESS	
PREVIOUS ADDRESS	STREET		CITY	STATE	LIVED AT ADDRESS HOW LONG.....YEARS.....MONTHS	
EMPLOYED BY	SELF ☐ OTHERS ☐	FIRM NAME			EMPLOYED HOW LONG.....YEARS.....MONTHS	PHONE NO.
BUSINESS ADDRESS	STREET		CITY	STATE	DEPARTMENT	BADGE NO.
OCCUPATION OR TRADE					TRADE UNION NAME AND NUMBER	CITY
MONTHLY INCOME $	SALARY ☐ COMMISSION ☐	DATE RECEIVED	MOST CONVENIENT DATE FOR MAKING PAYMENTS		OTHER INCOME $..... DESCRIBE	
PREVIOUSLY EMPLOYED BY	FIRM NAME AND ADDRESS				OCCUPATION OR TRADE	EMPLOYED HOW LONG.....YEARS.....MONTHS
BANK WITH					ADDRESS	CHECKING ☐ SAVINGS ☐
LIFE INSURANCE	NAME OF COMPANY				ADDRESS WHERE PREMIUM PAYABLE	
WIFE'S NEAREST RELATIVE, NOT LIVING WITH ME	NAME				ADDRESS	RELATIONSHIP
MY NEAREST RELATIVE, NOT LIVING WITH ME	NAME				ADDRESS	RELATIONSHIP

REFERENCES: BUSINESS HOUSES AND INDIVIDUALS WITH WHOM I (WE) HAVE HAD CREDIT OR INSTALMENT DEALINGS

	NAME	ADDRESS
PURCHASED LAST CAR FROM		
FINANCE COMPANY		
BUSINESS REFERENCE		
PERSONAL REFERENCE		
PERSONAL REFERENCE		

I (WE) OWN THE FOLLOWING REAL PROPERTY LOCATED AT

STREET	CITY	STATE	TOTAL CASH VALUE	TOTAL ENCUMBRANCE	TITLE IN NAME OF

ADDRESS OF GARAGE WHERE CAR WILL BE KEPT

LICENSE No. STATE

DRIVER'S LICENSE No.

DEALER REMARKS

UNDERSIGNED WARRANTS THE TRUTH AND ACCURACY OF FOREGOING INFORMATION

CUSTOMER SIGNS ☞ _____

SALESMAN SIGNS ☞ _____ DATE.....19.....

5211

[fol. 57] That certain small numerals appearing on the right-hand side of the work sheet correspond with the same small numerals appearing at the blanks in the conditional sale contract, and indicate to the retail seller the amount which should be filled in in the corresponding blanks in the contract, if the said contract is to be offered to G. M. A. C. for purchase.

7

In furtherance of its said retail plan and in anticipation of the offering of such contracts to it for purchase thereunder, G. M. A. C. equips dealers, as a convenience to them, with certain material for the purpose of facilitating and expediting the sale and purchase of the dealers' installment sale contracts. For example, it furnishes, free of charge to the dealers, the form of retail contract of conditional sale for use by them in contemplation of purchase by G. M. A. C. and representing the type of contract, as holder thereof after purchase, G. M. A. C. considers most suitable for the protection of its interests.

8

Similarly, G. M. A. C. furnishes the dealer with rate or payment charts designed for new and used cars in the case of retail sellers of automobiles. By means of these charts the dealer, after he has ascertained the amount of the down payment which will be paid by the retail buyer on delivery of the car, and the number of instalments into which the retail buyer wishes the remainder of the price to be divided, [fol. 58] and the type of car to be purchased is enabled to determine quickly and accurately the amount to be inserted in the contract provided by G. M. A. C. at the place designated "total time price" and indicated in the contract by the number (9) which corresponds to the same figure on the work sheet provided to the dealer by G. M. A. C. It is not necessary for the dealer to follow the forms provided by G. M. A. C. or to compute the total time price in the manner suggested by G. M. A. C. in its charts, or to fill out the retail instalments contract blanks according to the computations indicated in the work sheet provided by G. M. A. C., unless the dealer expects to offer the retail instalment contract to G. M. A. C. for purchase at a price, indicated in the chart as the unpaid balance of retail seller's price on a cash

sale, which price, together with the down payment received from the retail buyer, enables the retail seller, in the event G. M. A. C. purchases the contract in any instance, to realize out of the two transactions a total amount equal to his price for a cash sale.

9

G. M. A. C. is not a party to the instalment sale transaction or contract between the dealer and the retail buyer and it has and acquires no interest therein unless and until the contract is offered to and purchased by G. M. A. C. from the dealer. The dealer may add whatever amount he desires in arriving at or fixing his or its time price to the retail buyer.

The practice of all retail sellers, who sell automobiles by means of retail instalment contracts, is to compute the time price according to the rate or payment charts and other [fol. 59] memoranda or data provided by the finance company to which the retail seller usually offers retail instalment contracts for sale, and this is usually true even though the retail seller intends to keep the contract.

10

If G. M. A. C. accepts and purchases such retail contracts from dealers, it takes over from the latter and assumes numerous duties and tasks involved in the ownership acquired in the contracts from dealers by setting up an account for each of them and handling the collection of the instalments payable under the contracts, court proceedings and repossession of the property. For those purposes G. M. A. C. maintains an extensive office organization, equipment and personnel engaged in carrying on the various functions of its business in buying acceptable contracts, collecting same and protecting its investment therein. G. M. A. C. performs such functions at considerable items of cost and expense, including salaries aggregating approximately $150,000 per annum for an average of eighty-five employees, rent, cost of borrowing money for the supplying of capital necessary to enable it to maintain a volume of new business, organization expenses and the like.

11

Out of the differential or discount at which G. M. A. C. purchases a retail instalment contract from a retail seller,

G. M. A. C. may purchase and pay for a policy of insurance protecting the buyer and G. M. A. C. against loss to the property by fire, theft, accident, physical damage and, in [fol. 60] most cases, collision. Such insurance coverage is provided in fulfillment of the retail seller's representation to the retail buyer that the time price includes insurance coverage to be purchased by the retail seller, or if the retail instalment contract is to be sold to it, by G. M. A. C. without expense to the retail buyer. If the insurance is purchased by G. M. A. C., a certificate of insurance for which it pays is sent to the retail buyer by G. M. A. C.

12

In addition to the cost and expense of handling and collection of the contracts purchased from the dealers and repossession of the property whenever necessary, G. M. A. C. assumes, under the terms and provisions of its retail plan governing such contracts as it may purchase, all risk of loss resulting from its inability to collect from the retail buyer any part of the unpaid price obligation under the contract bought from the dealer and resulting from its inability to reposses the property either because the latter has been put out of its reach or for some other reason. When the dealer sells a contract to G. M. A. C., the assignment and transfer of it contains the dealer's guaranty of the retail buyer's payment of the contract obligation, but the dealer's contingent liability thereunder is limited by the terms and conditions of the G. M. A. C. retail plan, under the heading of Dealer Protection and Reserve, so that the dealer incurs no liability as a consequence of the retail buyer's failure to pay the balance of the price, except when G. M. A. C. effects repossession of the property and delivers it to the dealer.

[fol. 61] 13

In those cases where the property is repossessed and turned over to the dealer on the latter's payment of the unpaid balance of the price, the dealer may or may not sustain a loss, depending on the resale value of the property as compared with the amount the dealer may have to pay G. M. A. C. The risk of loss under these circumstances remains with and is borne by the dealer.

14

In recognition of the retail seller's risk of such loss and his or its continued responsibility for such loss factor, the arrangement between the retail seller and G. M. A. C. provides that if G. M. A. C. purchases an instalment contract, it will protect the dealer against the loss hazard referred to in Finding No. 13 by setting up and crediting a reserve account in the dealer's favor with a stipulated portion of G. M. A. C.'s differential in the price paid by it to the retail seller on the purchase of the contract. G. M. A. C. makes payments to the retail seller out of the accumulated reserve fund from time to time.

G. M. A. C.'s experience over many years shows a normal of between three and seven repossessions of new cars out of every 100 financed, depending on the retail seller and the territory covered. On used cars the number of repossessions varies between 7 and 15, depending on the retail seller's used car policies and the territory covered. Whether a loss is suffered by the retail seller in the event of a repossession depends upon the resale value of the merchandise. The amount of the reserve which G. M. A. C. agrees to set aside for the retail seller is calculated upon the basis of its [fol. 62] experience and that of dealers in all sections of the country, and is so fixed, in the opinion of G. M. A. C., as to be sufficient, in the case of the average dealer, to cover all losses and provide an additional margin over losses in excess of the actual loss experience.

15

Not less than 140 companies in the State of Indiana are engaged in the business of purchasing retail instalment sales contracts from retail sellers covering sales made to their customers on the instalment plan. The method of doing and carrying on the business is essentially identical with the method and manner in which G. M. A. C. carries on its business, except as pointed out in Finding No. 17 and except that many of the 140 finance companies are not affiliated directly or indirectly with any manufacturer of merchandise, and do not refrain from doing business with any retail seller whatever merchandise he may be selling, if the contracts offered to such finance companies by such retail sellers are satisfactory as to terms and conditions. Each of the finance companies engaged in the business in Indiana

maintain an office organization, equipment and personnel to carry on its functions in the business in which it is engaged, sets up an account for the retail contracts purchased by them. Each of the finance companies takes the foregoing elements into consideration as well as other costs of doing business, including cost of capital, cost of insurance and profit, in determining the differential or discount of the finance company for purchasing the contracts.

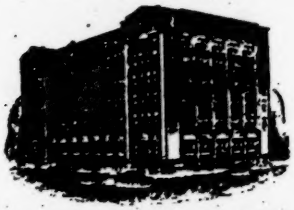
[fol. 63] 16

Most of the finance companies doing business in Indiana, as well as G. M. A. C., furnish rate or payment charts, forms of contracts, work sheets and similar data to retail sellers generally, in the same manner that like material is furnished to General Motors Corporation's retail sellers by G. M. A. C. One rate chart in use in Indiana is as follows:

(Here follow 2 photos, side folios 64 and 64½)

Automobile Retail Plan

For New Cars Only



HOW TO USE PLAN

EXAMPLE:

Delivered Price	$900
Down Payment	300
Unpaid Balance	$600

Under Unpaid Balance Column you will find $600, follow line to right for number of months and size of payments desired. If 12 months is desired the payments will be $55.00 each; 24 months, $30.70 etc.

No charges on deferred payments if purchaser pays on or before maturity. If not so paid necessary collection charges are added.

DOWN PAYMENT

MUST BE CASH OR TRADE-IN ALLOWANCE

MINIMUM DOWN PAYMENT: 33⅓% OF THE CASH SELLING PRICE.

INSURANCE

CUSTOMARY COVERAGE

Fire and Theft Insurance—80% of Cash Selling Price.

For maximum insurance protection when the Down Payment is more than 66⅔%, add ⅓ of 1% of the Cash Selling Price to the amount of the note.

This rate sheet has been carefully prepared as a guide to sound financing, after investigating automobile time sales methods and rates throughout the United States and is distributed for the convenience and benefit of automobile dealers.

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Associates Investment Company

Executive Offices

ASSOCIATES BLDG. SOUTH BEND, IND.

E. M. Morris, President Lew Fleming, Secretary

Akron, O., 1002 First Central Trust Bldg.
Ann Arbor, Mich., 411 First National Bank Bldg.
Battle Creek, Mich., 316 City Nat'l Bank & Trust Bldg.
Canton, O., 1101-02 Gen. D. Harter Bank Bldg.
Cleveland, O., 401 Union Bldg.
Detroit, Mich., 616 Macomber Bldg.
Elkhart, Ind., Room 1-2, 301 South Main St.
Flint, Mich., 1106 Union Industrial Bank Bldg.
Ft. Wayne, Ind., 545 Old First Bank Bldg.
Gary, Ind., 444 Gary State Bank Bldg.
Grand Rapids, Mich., 409 Ass'n of Commerce Bldg.
Hammond, Ind., 517 First Trust Bldg.
Indianapolis, Ind., 418 Medical Arts Bldg.
Jackson, Mich., 701 Central State Bank Bldg.
Kalamazoo, Mich., 401 Peck Bldg.
Lansing, Mich., 400 Mutual Bldg.
Minneapolis, Minn., 506-507 Wesley Temple Bldg.
Muncie, Ind., 302 Western Reserve Bldg.
Muskegon, Mich., 422 Lyman Bldg.
Pontiac, Mich., 400 Pontiac Cent'l Bank Bldg.
Port Huron, Mich., 272 W. S. Savings Bank Bldg.
Saginaw, Mich., 434 Building & Loan Bldg.
Toledo, O., 310-321 Richardson Bldg.
Washington, D. C., 839 Tower Bldg.
Youngstown, Ohio, 1114 Mahoning Bank Bldg.

ASSOCIATES DISCOUNT CO.

Albany, N. Y., 711 Home Savings Bank Bldg.
Binghamton, N. Y., 702 Security Mutual Life Bldg.
Buffalo, N. Y., 310 Vare Building
Jamestown, N. Y., 204-206 The Bank of Jamestown Bldg.
Niagara Falls, N. Y., 201 N. F. Trust Co. Bldg.
Rochester, N. Y., 34 State St.
St. Louis, Mo., 416 Missouri Theatre Bldg.
Syracuse, N. Y., 600 State Tower Bldg.

ASSOCIATES INVESTMENT CO. of Illinois

Chicago, Ill., 901 Lake Shore Trust and Sav. Bank Bldg.
Erie, Pa., 502 Erie Trust Bldg.
Milwaukee, Wis., 601 Milwaukee Gas Light Co. Bldg.
Philadelphia, Pa., 906 Stacdt Bldg.
Springfield, Ill., 420 Baltch Bldg.

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RETAIL TIME SALES PLAN FOR NEW CARS ONLY

Unpaid Balance Column	Schedule of Monthly Installments and Total Amount of Note							
When the Unpaid Bal. is	12 Monthly Installments		10 Monthly Installments		8 Monthly Installments		6 Monthly Installments	
	Each	Amount of Note	Each	Amount of Note	Each	Amount of Note	Each	Amount of Note

[fol. 65] In their essentials the forms of contract and other material furnished to the retail seller by the finance companies other than G. M. A. C. are not different from those furnished to General Motors Corporation's retail sellers by G. M. A. C. The form of contract generally provides for a total time price to be paid by the retail buyer, the division of the unpaid balance of the purchase price into instalments, and the retention of a security interest by the retail seller in the merchandise sold.

The rate charts which are furnished to the retail seller by the finance companies are so set up that the amount of the finance charge can be computed on any conceivable dollar basis that remains after the purchaser is given credit for the amount of his down payment against the cash sale price of the merchandise purchased, and after the length of time for payment has been determined by the parties. Some finance companies have many different rate charts for the same new car as well as for old ones.

17

The principal difference between the various finance companies doing business in Indiana, including G. M. A. C., so far as their methods of doing business are concerned, is in the terms and conditions under which they purchase retail instalment contracts from retail sellers. Some companies purchase these contracts on a "with recourse" basis, others purchase on a "without recourse" basis, and still others, including G. M. A. C., purchase on what is known as a "with repurchase" basis.

The terms "without recourse" and "with recourse" have a definite meaning to retail sellers and complainant and in the finance business. The first means that the fi- [fol. 66] nance company is to accept the retail instalment contract which it may purchase from the retail seller without any right whatsoever against him as the assignor thereof or otherwise in the event the purchaser of the automobile defaults in his obligations under the conditional sale contract. In the event of default the finance company suffers whatever loss there may be. The term "with recourse" on the other hand means that dealer will perform the obligations of the buyer in the event the latter defaults, and the result is that when a default occurs the dealer must pay the finance company the unpaid balance

owing by the purchaser at the time of the default and takes the merchandise together with the losses or gains, as the case may be. Few finance companies do business wholly in one way or the other. Part of their business is taken with recourse and part without recourse, depending upon the credit factors involved. Other companies operate on neither plan, but upon a combination of the two whereunder the loss hazard is divided between the dealer and the finance company to which he has assigned his retail instalment contracts. The latter plan is followed by G. M. A. C. and is known in the trade as "with repurchase".

Under the G. M. A. C. retail plan payment of the unpaid balance owed by the buyer is requested from the dealer when the repossessed automobile is returned to him, but arrangements may be made by the dealer to extend this request for payment until a buyer has been found for the automobile with a maximum period of thirty days from the date of repossession allowed.

[fol. 67] 18

Every finance company and retail seller recognizes that losses will occur and to compensate the finance company as assignee of the retail installment contract and the retail seller as the original party thereto for such losses, there is included in the differential or discount fixed by the finance company in the rate or payment charts, an amount which may be set aside as a reserve for losses. This amount is included in the differential or discount irrespective of the type of assignment which the finance company requires from the retail seller. Out of the reserve the retail seller and finance company are compensated for losses which occur, and a division of the item may be made between them according to the proportion of the risk of loss borne by each. From time to time, G. M. A. C. advises the dealers with which it does business of the amount of the reserve which is being set up for their benefit out of the differential or discount at which G. M. A. C. purchased the contract.

19

In adding the time price differential or finance charge as it is sometimes known, the dealer may not know the amount which it would cost him to command the capital

necessary to carry on his business without the assistance of G. M. A. C. or other finance company, and he may not know the cost of collection or the cost of the loss hazard or other factors involved. Such dealer assumes that the factors considered by G. M. A. C. and other finance companies in making up the differential or discount shown on [fol. 68] their rate or payment charts are identical with factors which dealers would consider if constructing a time price differential. In the majority of instances the dealer sells his contracts because he would not have sufficient capital to carry on the same volume of business unless he sells the contracts to G. M. A. C. or other finance companies. He accepts and adds to the price of his merchandise, for the purpose of constructing the time price, the time price differential equal to the discount shown by the rate chart prepared by the various competing finance companies with whom he does business.

20

A number of other companies engaged in purchasing instalment sale contracts from dealers purchase such contracts from them on a "without recourse" basis, in which case the dealer, upon transfer of the contract, does not assume any liability or bear the risk of loss in respect of which the dealer selling the contract to G. M. A. C. under its retail plan is protected by said reserve. It is the practice and a part of the arrangement between such other companies and dealers from whom they purchase the contracts that the companies pay and the dealers receive an amount, known and designated variously and indiscriminately as Dealer's Bonus, or Participation, out of such other companies' differential.

21

The Department of Financial Institutions is a department of government of the State of Indiana created under [fol. 69] the Indiana Financial Institutions Act, Acts of the General Assembly 1933, Chapter 40, sections 1 and 4. The function of the Department is to supervise, regulate and control the business of banks, trust companies, building and loan associations and other credit agencies, as well as small loan licensees furnishing money in amounts of $300 or less. From the time it was established on July 1, 1933,

it received complaints from different persons directed against various types of financial institutions, including companies engaged in the same business in which G. M. A. C. is engaged, and because of the complaints and in pursuance of its power of investigation, the Department began a study of consumer credit agencies operating in Indiana, the result of which was contained in a report published and presented to the 79th Session of the General Assembly of the State of Indiana, which report was entitled "Indiana Consumer Finance Agencies." The report was not limited simply to finance companies, but included all agencies theretofore under the supervision of the Department, in so far as those agencies and companies supplied credit to consumers, as well as instalment sellers who hold their own paper and companies engaged in the same business in which G. M. A. C. is engaged. A considerable portion of the report was devoted to finance companies and what the report characterized as their "effective rates of interest for the extension of credit", the desirable and undesirable features of the business, as well as the undesirable features of instalment selling by dealers who hold their own paper, and the recommendations of the Department for legislation to restrict the original contract between buyer and seller, as well as supervise finance companies.

[fol. 70] 22.

Prior to the enactment of the Retail Instalment Sales Act, the amount of the time price differential or discount was not generally shown as a separate item in the contract between the retail seller and retail buyer, but a sum total price for the merchandise known as "the total time price" included the time price differential. The time price differential was known popularly as "the finance charge." The amount of the finance charge was ascertainable by the retail buyer from the retail seller, or otherwise, by computing the same by deducting the unpaid balance of the cash price, after giving effect to the down payment to be made by the retail buyer, from the amount shown in the rate or payment chart for the corresponding unpaid balance. The finance charge was represented to include cost of insurance, but the actual cost of the insurance, as distinguished from the remaining part of the finance charge,

might not be known to the retail seller or to the betail buyer. Without knowing the insurance cost, the buyer could not compute the actual amount of the time price differential less the insurance cost in terms of interest.

The form of contract supplied to the retail seller by the finance company contemplated the sale of the merchandise at whatever price was agreed upon by the parties and that price was known as "the time price". No separate item appeared in the contract as the time price differential, and the said differential included in the total time price was not translated into percentage calculations based upon the unpaid cash balance.

[fol. 71] 23

The amount of the finance company's discount for purchasing a retail instalment sale contract varies in accordance with the character and type of the merchandise covered by the contract, and in accordance with other variable factors, such as the credit risk or loss hazard involved and the cost of collection; and similarly, the retail seller's time price varies, depending upon these variable factors. If it is new merchandise, such amounts are less, because the depreciation factor, if a sufficient down payment has been obtained, does not require as high a time price or discount for purchasing the contract. If the merchandise is used, the depreciation factor must be dealt with otherwise, and the amounts are relatively higher, and, likewise, if the credit risk or loss hazard is greater or the contemplated collection costs higher. The variation of said amounts for twenty companies in Indiana on the identical unpaid balance of three hundred dollars ($300.00) on the purchase on instalments of a new automobile ranged from $28.00 to $60.00 for one year. These amounts in terms of interest based upon the diminishing unpaid balance ranged from 18.7% to 44.4% per annum. On used automobiles for the same unpaid balance for the same period of time the amounts ranged from $35.00 to $85.20, and these amounts, in terms of interest similarly computed, ranged from 23.9% to 69% per annum. In the purchase of furniture generally these amounts on the average are higher. In the case of the purchase of radios, these amounts are higher than in the case of either of the other two commodities mentioned. In the case of the purchase of automobile tires, these

[fol. 72] amounts are in a still higher range. The range, expressed in terms of interest computed on the diminishing unpaid balance, is from 33.6% to 106.1% per annum.

The above amounts, as to both new and used automobiles, included the cost of insurance for the retail buyer. The types of insurance coverage, the cost of which was included in these various amounts, is not disclosed by the evidence, nor the amount of the coverage. Insurance costs vary in amount according to types of coverage, make of car, zone in which kept and amount for which insured, and this variable factor and the other variable factors mentioned above account for part of the variation in amounts, the extent of which can not be determined from the evidence.

The evidence does not disclose whether insurance for the retail buyer was included in the amounts mentioned above in terms of interest for the purchase of furniture, radios and for automobile tires. Instalment sales of automobile accessories, in which classification tires are included, amount to less than ½ of 1% of the total instalment sales in Indiana; instalment sales of radios, together with instalment sales of electric goods and refrigerators, amount to about 6½% of all instalment sales in Indiana, and instalment sales of furniture stores to approximately 13% thereof.

For a transaction in Indianapolis, Indiana, by a GMAC dealer, involving the sale of a new Chevrolet passenger car on instalments under a conditional sale contract, the amount of which contract was payable in twelve equal monthly instalments, and which contract GMAC purchased, the cash [fol. 73] delivered price of the car was $720.00. The down payment by the purchaser was $240.00, the cash balance remaining after giving effect to the down payment was $480.00, and the amount of the conditional sale contract signed by the purchaser (cash balance of $480.00 plus differential of $66.48) was $546.48. After deducting from the differential of $66.48 the manual cost of fire, theft, accidental physical damage and $25.00 deductible collision insurance amounting to $34.08, and after deducting the amount of the dealer's reserve of $7.57, the remainder of said $66.48, amounting to $24.83, in terms of interest, based on the diminishing balance of $546.48, amounted to 8.39 percent per annum.

For a transaction in Indianapolis, Indiana, by a GMAC dealer, involving the sale of a used Chevrolet passenger

car on instalments under a conditional sale contract, the amount of which contract was payable in twelve equal monthly instalments, and which contract GMAC purchased, the cash delivered price of the car was $500.00. The down payment by the purchaser was $170.00, the cash balance remaining after giving effect to the down payment was $330.00, and the amount of the conditional sale contract signed by the purchaser (cash balance of $330.00 plus differential of $60.96) was $390.96. After deducting from the differential of $60.96 the manual cost of fire, theft, accidental physical damage and $25.00 deductible collision insurance amounting to $29.08, and after deducting the amount of the dealer's reserve of $10.77, the remainder of said $60.96, amounting to $21.11, in terms of interest, based on the diminishing balance of $390.96, amounted to 9.97% per annum.

[fol. 74] The time price differential in each of the above cases is the actual amount shown in the GMAC charts for new passenger cars and used passenger cars, respectively, currently furnished to dealers in Chevrolet automobiles in the Indianapolis territory.

There are variations in the GMAC's payment charts, depending upon the make of car and the insurance zone in which the car is to be kept, but the foregoing illustrations are typical of the time price differentials which are generally made use of by retail sellers in arriving at the time prices at which they sell at retail new and used automobiles manufactured by General Motors Corporation or its divisions.

24

None of the factors other than insurance which are used by the finance companies to make up the differential or discount, and none of the factors which are used by retail sellers in making up the finance charge, are available to the State of Indiana or to the retail buyer for scrutiny. Neither the cost of capital, the cost of investigation, the cost of bookkeeping and other overhead expense, the cost of collection, the loss hazard and the depreciation factor, nor any other element which is a factor considered in making up the differential or discount and in making up the finance charge, is available.

25

The Department of Financial Institutions in its report to the Governor and the General Assembly, recommended that the cost of the credit extension, as the term is used in its [fol. 75] report, be separated from the cost of insurance and expressed in terms of a rate per cent per month based upon the diminishing unpaid balance of the price of the merchandise. This recommendation was made to give the retail buyer a comparative cost basis.

The finance companies had conducted their business of buying instalment contracts upon the basis of a flat charge by way of what was called discount.

26

The dealer's reserve is an allowance out of the differential or discount and is usually a certain percentage allowed the dealer on retail instalment contracts assigned by him. The reserve is contracted for between the dealer and the finance company, either by general blanket agreement or by agreement made at the time of the assignment of the particular contract. The theory underlying reserves is that there must be compensation for the loss hazard. The difference in loss hazard between new and used merchandise accounts for the larger reserve paid on transactions involving old merchandise.

27

The "rebate" is a name given to a practice engaged in by some finance companies, whereunder the finance company, by special agreement with the retail seller, furnishes him or it with its regularly authorized finance charges as printed on its rate or payment chart, but agrees to and pays the retail seller a certain amount in cash on each contract accepted by the finance company. The rebate is distinguished from the payment of a reserve out of an accumu- [fol. 76] lated fund by a "with recourse" or "with repurchase" company and from like payment of a bonus by "without recourse" companies and is paid and goes to the retail seller without any restrictions whatsoever. The evidence does not disclose the amounts paid as rebates.

28

To the extent that it exists at all, the "dealer's pack" exists only in the case of the instalment sale of automobiles. Automobile instalment sales in Indiana constitute more than 60% of all retail instalment sales. The "dealer's pack" does not exist in connection with the sale of those commodities, the sales of which constitute 40% of total retail instalment sales. The "dealer's pack" is an expression used to identify the amount which some retail sellers may feel justified in including in the time price to the retail buyer over and above the sum total of the "discount" which the finance company will receive after purchase of the contract plus the amount necessary to protect the retail seller on account of the recourse, if any, to which he is subject.

The practice is for the dealer to add to the finance charge an additional amount known as pack. The retail buyer is not informed as to what this item is, and may be led to believe that the whole amount added to the unpaid balance, including the pack, is retained by the finance company. In practice the finance company collects but does not retain the pack. The dealer collects the amount from the finance company at the time of the sale of the contract, or, in some instances, after the contract has been fully paid, the amount is credited to the reserve account of the dealer with the finance company. The common range of packs is from $10 [fol. 77] to $25, although in some instances it may reach $40 or more.

29

Whether the retail seller marks his cash price low and justifies his time price by the amount of the so-called finance charge which has been made larger by the amount of the "dealer's pack", or whether he marks his car with a high cash price and makes the so-called finance charge low, the result is the same; the total time price which must be obtained from the retail buyer for the car is the same in both cases and the "dealer's pack" represents only a difference in the retail seller's selling policies.

Any rebate or bonus paid to the dealer likewise increases the time price to the buyer.

30

Forms of contracts supplied to retail sellers by finance companies generally contain no provision for a return of

any part of the finance charge or time price differential to the buyer in the event he wishes to prepay the contract. In the event of prepayment the finance company, in those instances where there is a pack or rebate, must, if it has already paid the amount of the pack or rebate to the dealer, collect the amount from the buyer to reimburse itself.

31

In the contracts supplied by finance companies to retail sellers, provision for the collection of interest on overdue [fol. 78] instalments at the highest legal contract rate is frequently made. Some finance companies make charges against and collect from the retail buyer amounts on account of letters sent or acts done by the finance company in connection with the collection of instalments that are delinquent. A delinquency charge is a necessary one.

The report of The Department of Financial Institutions entitled "Indiana Consumer Finance Agencies", did not deal with the subject of delinquencies for the reason that the recommendation of the Division of Research and Statistics was that the amount permitted as a finance charge be a rate per cent per month on the unpaid declining cash balance.

Some finance companies assess the purchaser as a delinquency charge a small fee which is a lump sum provided by its rules of collection known as reinstatement fee. This fee is collected before the account which has become past due is again put in good standing.

In connection with the delinquent charges some companies also have transfer fees which are charged against the person who purchases an automobile from a conditional vendee whose contract has been assigned to the finance company, and which purchaser desires to continue to make the payments according to the provisions of the original conditional vendee's contract. The finance company justifies this charge on the ground that additional bookkeeping is entailed in transferring the account.

The collection of delinquency charges, reinstatement fees and transfer fees is sometimes enforced against the purchaser by means of refusing to deliver to him the certificate [fol. 79] of title issued by the State of Indiana. When the automobile is sold on instalments and by means of the conditional sale agreement, the title to the automobile is re-

tained by the vendor and subsequently assigned to the finance company.

32

During all times herein mentioned some finance companies operating on a without recourse basis have paid a bonus to dealers, even though the dealer has no liability on the contract assigned to the finance company. During the same time G. M. A. C. has continued to set aside the reserve provided in the G. M. A. C. retail plan and has paid the amount thereof to dealers from time to time.

33

G. M. A. C. and other factory affiliated finance companies purchase together more than 60% of all of the instalment contracts arising out of retail automobile instalment sales in the State of Indiana.

34

The purchase of an automobile or other desired merchandise on time is the gratification of the buyer's preference for the present use and enjoyment thereof which is made available to him by the method of instalment purchase, as against deferring present use and enjoyment until he has accumulated sufficient funds to make a cash purchase, and, except for the down payment, as against paying out of accumulated capital, as for example, balances in commercial or savings banks. In order that the retail buyer may [fol. 80] purchase the merchandise on time, his ability to make the necessary down payment and to pay the instalments of the time price must be demonstrated and established to the satisfaction of complainant.

35

There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts.

36

The net worth of G. M. A. C.'s business is in excess of $50,000. During the calendar year 1934, it purchased retail instalment sale contracts in Indiana aggregating in excess of $7,000,000; and the value of such purchases for the first six months of 1935 is in excess of $4,000,000. During the calendar year 1934, G. M. A. C. purchased in Indiana approximately 23,000 instalment sale contracts from more than 500 dealers.

37

The business of retail sales of automobiles in which the retail seller is engaged, as well as the business of retail sales of other goods having standard prices, is a highly competitive one, in which the amount of the time price [fol. 81] as well as the cash price to retail buyers constitutes a material and important competitive factor. The importance of this factor is emphasized by the interest which the manufacturers of automobiles and other standard articles have in maintaining, for competitive reasons, the retail prices, as well as the cash prices of their products, as low as possible. Other finance companies compete with G. M. A. C. and other factory-owned and factory-affiliated companies, and commercial banks, small loan companies and industrial banks also compete in this field.

38

Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana became effective on July 1, 1935, and the defendants will in so far as required by said act, in their respective capacities, enforce the act in all of its provisions unless restrained by the court.

[fol. 82] Conclusions of Law

Upon the foregoing facts the court states its conclusions of law as follows:

1. That Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives complainant of its property without due process of law.

2. That plaintiff is entitled to a judgment perpetually enjoining and restraining the defendants and each of them and their respective agents and employees from in any manner enforcing or threatening to enforce against complainant the provisions of said act.

George T. Page, U. S. Circuit Judge. Patrick T. Stone, U. S. District Judge. Thos. W. Slick, U. S. District Judge.

[fols. 83 & 84] IN UNITED STATES DISTRICT COURT

FINAL DECREE—October 2, 1935

And now upon the foregoing findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed that defendants and each of them and their assistants, deputies, agents and employees be forever enjoined and restrained from enforcing or attempting to enforce against complainant any of the provisions of the Act of the General Assembly of the State of Indiana entitled "An Act to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such contracts, to empower the department of financial institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales." being Chapter 231 of the Acts of the General Assembly of the State of Indiana at the 79th Regular Session, and from exacting or attempting to exact from complainant any of the penalties which said Act purports to prescribe for violations thereof, and from instituting any proceedings against complainant to enforce or exact any of such penalties.

[fol. 85] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed Dec. 23, 1935

PETITION FOR APPEAL

Considering themselves aggrieved by the decision of the District Court of the United States for the Southern District of Indiana, (Indianapolis Division) in cause number 1686 in equity in said Court, wherein General Motors Acceptance Corporation of Indiana, Incorporated, is the complainant, and Paul V. McNutt, Governor of the State of Indiana, Philip Lutz, Attorney General of Indiana, Richard A. McKinley, Director of the Department of Financial Institutions of the State of Indiana, Oscar P. Welborn, Harvey B. [fol. 86] Hartsock, C. M. Setser, Myron Gray and Robert Batton, Members of the Commission of Financial Institutions of the State of Indiana and Herbert M. Spencer, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana, are defendants, the said defendants therein hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said defendants (appellants) assign the following errors in the record and proceedings in said case:

1. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its first conclusion of law in said case in holding and deciding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives complainant of its property without due process of law.

2. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its second conclusion of law in said case in holding and deciding that the complainant is entitled to a judgment perpetu-

ally enjoining and restraining the defendants and each of them and their respective agents and employes from in any manner enforcing or threatening to enforce against the complainant the provisions of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana.

3. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its [fol. 87] decree in granting and issuing the injunction herein.

4. The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in failing to find as a fact and in disregarding the same in its conclusions of law and decree that the business whose regulation is provided for by Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is designed for use by and is used by a considerable portion of the people of the State in the financing of retail instalment purchases; that such business and the methods of transacting the same operate to the detriment of the retail instalment buyer who pays the cost of the supplying of capital by the finance companies to the retail dealers but who, instead of deriving benefit from the competition between finance companies for the retail dealers' business, are placed at a disadvantage by the concealment of "packs" and "bonuses" as a part of the finance charge and by other methods shown by the evidence; and that by reason thereof said business directly affects the public welfare and is subject to regulation under the police power.

Prayer for Reversal

For which errors the defendants (appellants) pray that the said decree of the District Court of the United States for the Southern District of Indiana (Indianapolis Division) dated October 2, 1935, in the above entitled cause be. [fols. 88-121] reversed and a judgment rendered in favor of the said defendants and for costs.

Philip Lutz, Jr., Attorney General; Joseph W. Hutchinson, Assistant Attorney General; —— ——, Assistant Attorney General; Leo M. Gardner, Counsel for Appellants.

[fol. 122] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL, FIXING APPEAL BOND, ETC.—
December 23, 1935

The appellants (defendants) in the above entitled suit, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit by the District Court of the United States for the Southern District of Indiana (Indianapolis Division) on the 2nd day of October, 1935, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, and prayer for reversal, and having presented a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States for the Southern District of Indiana (Indianapolis Division) in this cause, as provided by law, and it is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings, and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $1,000.00.

And the defendants file appeal bond in the sum of One Thousand Dollars ($1,000.00) with National Surety Corporation as surety thereon, which bond is approved by the Court and is as follows:

[fols. 123-127] Bond on appeal for $1,000.00, omitted in printing.

[fols. 128-134] Citation, in usual form, showing service on Paul Y. Davis et al., filed Dec. 26, 1935, omitted in printing.

[fol. 135] ENTRY FOR DECEMBER 26, 1935

Also lodge condensed statement of evidence.
Also file præcipe for record, which is as follows:

[fol. 136] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 26, 1935

You are hereby requested to make and transmit to the Supreme Court of the United States under your hand and the seal of the District Court a true copy of the material parts of the record in the above entitled cause, including therein the following:

1. The Bill of Complaint.
2. The Answer.
3. All rulings of the Court and exceptions thereto and all order book entries in said cause.

[fol. 137] 4. The findings of fact and conclusions of law.
5. The final decree.
6. (a) The petition for appeal, assignment of errors and prayer for reversal;
(b) The order of the Court allowing the appeal;
(c) The typewritten statement particularly disclosing the basis upon which it is contended the Supreme Court has jurisdiction;
(d) The statement directing the attention of appellee to the provisions of paragraph 3 of Rule 12 of the Supreme Court;
(e) The proof of service on appellee of the foregoing papers indicated by 6(a) to (d) inclusive.
7. The appeal bond and the approval thereof.
8. The condensed statement of the evidence, and attach to such transcript the original Citation with proof of service thereof, and a copy of this præcipe.

Philip Lutz, Jr., Attorney General; Joseph W. Hutchinson, Assistant Attorney General; Leo M. Gardner, Counsel for Appellants.

[fols. 138 & 139] The undersigned hereby acknowledge service of a copy of the foregoing præcipe this 24th day of December, 1935.

General Motors Acceptance Corporation of Indiana, Incorporated, by Smith, Remster, Hombrook & Smith, by Paul Y. Davis, Attorneys for Appellee.

[fol. 140] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION CONCERNING CONDENSED STATEMENT OF THE EVIDENCE—Filed Jan. 8, 1936

It is stipulated between appellants and appellee (plaintiff and defendants) in the above cause that for the purpose of appellants' appeal from the final decree therein rendered, the special finding of facts made by the United States District Court for the Southern District of Indiana may be treated as supported by the evidence with the exception of the following statements in said findings as to which there is controversy between the parties, namely:

Finding Number 35.

There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter [fol. 141] class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts.

It is further stipulated that the evidence relevant to the controverted finding above set out was in substance the following:

Edward E. Edwards in affidavits submitted in this Cause, deposed as follows:

I am now an employee in the Division of Research and Statistics of the Department of Financial Institutions of the State of Indiana (hereinafter called the Department) and have been since the said Department came into existence on July 1, 1933. I have recently been appointed supervisor of such division beginning July 1, 1935. I am a grad-

uate of Indiana University, obtaining the degree Bachelor of Science in 1928 and the degree Master of Science in 1934. In addition to the experience and education set out above I have had several years business experience, including three years in the organization of the Comptroller of Manufacture of Western Electric Company, Chicago, Illinois, and one year in the general office of Trustees System Service, Chicago, Illinois, a corporation engaged in the extension of consumer credit.

As a part of my duties in the Division of Research and Statistics of the said Department, I conducted a study of the consumer credit agencies of the State of Indiana, under the supervision of Mr. H. B. Wells. Since the completion of this report I have been further engaged in assisting with the drafting of the Act herein attacked and conferring with [fol. 142] the representatives of the finance business and with dealers and merchants affected by said Act, for the purpose of drafting fair and workable regulations which might be promulgated for the Commission for Financial Institutions.

Installment buying is a device which makes possible the purchase of consumption goods of a market value which prevents their purchase out of current income or accumulated savings. Naturally, installment buying is the means of purchase resorted to by persons or families who have a limited income and from which little savings may be made. According to the 1930 census, there were 843,066 families in Indiana. Based on federal income tax returns and on a house to house study of home ownership in the City of Indianapolis, I estimate that at least 700,000 of these families have an annual income of less than $2400 and that 400,000 of these families have an annual income of less than $1000. Since the average family in Indiana, based on 1930 census figures, contained 4 persons approximately, it is readily apparent that most of the families in the above income groups could not purchase commodities normally sold on the installment plan, including furniture, stoves, electrical appliances, such as washing machines and vacuum cleaners, radios, automobiles and jewelry, out of accumulated savings but are, by necessity, forced to accept installment credit. Clearly, the buyers of the above classes have little bargaining power which may be used to combat the combination of the dealer and finance company in the practices of which he is the victim. The regulation of install-

ment credit by the State offers an intermediate power to [fol. 143] assist the buyer in the purchase of his commodities on a reasonable basis of cost for the credit extension involved and immediately affects the general prosperity of all persons and families who constitute the income classes above set out.

Milan V. Ayres in affidavits submitted in this cause, deposed as follows:

I reside at 5527 University Avenue, Chicago. I hold the office of Secretary and Analyst of the National Association of Sales Finance Companies, a voluntary association organized in 1924 and now having as members 219 sales finance companies located in all parts of the United States, besides seven members in Canada. I have held the position of analyst for the association for nine years, during all of which time my duties have included the gathering and study of statistics and general information relating to instalment selling and the financing of instalment sales.

It is stated by Mr. Edward E. Edwards that according to the 1930 census there were 843,066 families in Indiana, of which Mr. Edwards estimates that at least 700,000, or about 85 per cent. have incomes of less than $2,400 per year and 400,000, or about 47 per cent. have annual incomes of less than $1,000. These figures are used to support the contention that a very large proportion of the population are "by necessity forced to accept instalment credit" and "have little bargaining power", and that therefore the Retail Instalment Sales Act is legislation for the general welfare.

The fallacy in defendants' contention lies in the assumption that instalment buying is typically the recourse of the poor. As a matter of fact instalment purchasing is done [fol. 144] chiefly by fairly prosperous people, and hardly at all by those families having incomes of less than $1,000 annually—which Mr. Edwards characterizes as having "little bargaining power". Incidentally, of the 400,000 families which Mr. Edwards estimates have an annual income of less than $1,000, probably more than one-fourth were on relief (the monthly report of the Federal Emergency Relief Administration dated from March 1, 1935 through March 31, 1935 showed that 114,000 families in Indiana were on relief and in addition 22,000 individuals.)

Families having a total annual income of less than $1,000 and of course families on relief, are obliged to spend prac-

tically their entire income for the primary necessities—which are of course food, fuel, clothing and shelter. Food, fuel and shelter are not sold on the instalment plan, and only a very small percentage of clothing is so sold. The best available data indicate that in 1929 only 3.2 per cent. of the retail sales of clothing stores in Indiana were made on the instalment plan and none of the sales of shoe stores. Undoubtedly the great bulk of the instalment clothing sales consisted of the more costly items, such as fur coats, dress suits and the like, which were not purchased by poor families.

The families which purchase instalment goods have been almost exclusively those which have a fairly assured income over and above that requisite for purchasing the primary necessities. The poor have not been the buyers of such goods because they could not be, and because, while often very desirable, such goods are not essential to sustain life [fol. 145] in health and comfort.

The purchasers of instalment goods cannot be deemed to be under any necessity of buying. They can do so or not as they see fit. They need not buy at once, but can wait as long as they choose. They can go from one merchant to another, seeking the best price, or they can borrow in order to buy. The statement that such people have "little bargaining power" or fail to exercise it is contrary to the fact.

Summarizing the above: it is those families having annual incomes over $1,000 (the remaining 53%, using Mr. Edwards' purely estimated figures) which are principally affected by the Retail Instalment Sales Act; these families have no lack of "bargaining power"; the Act does not affect at all the sales of the primary necessities, because such sales are not made on instalments; and it cannot affect to any determinable degree, however slight, the necessitous, the poor, the people of "little bargaining power", because such people seldom buy anything on instalments.

It is further stipulated that the foregoing evidence, together with the special findings of fact made by the United States District Court for the Southern District of Indiana, constituted all of the evidence and facts necessary to the consideration of the questions presented by appellants' assignment of errors herein and that this stipulation shall be included in the transcript of the record on appeal from the

final decree in this cause in lieu of the condensed statement of the evidence required by Equity Rule 75.

Philip Lutz, Jr., Attorney General; Joseph W. Hutchinson, Assistant Attorney General; Leo M. Gardner, Solicitors for Appellants. Smith, Remster, Hornbook, Smith, by Paul Y. Davis, Solicitors for Appellee.

[fol. 146] Approved by the court this 7th day of January, 1936, and ordered filed as a part of the record in this cuase.

George T. Page, Judge of United States Circuit Court of Appeals, Seventh Circuit; Patrick T. Stone, Judge of the District Court of the United States for the Western District of Wisconsin; Thos. W. Slick, Judge of the District Court of the United States for the Northern District of Indiana, Sitting in said cause in the Southern District of Indiana (Indianapolis Division) as a special Statutory Three Judge Court.

[fol. 147] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 148] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed Jan. 21, 1936

The appellants in the above entitled cause say that the points which they intend to rely upon in this court in this case are as follows:

I

The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its first [fol. 149] conclusion of law in said case in holding and deciding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives complainant (appellee herein) of its property without due process of law.

1. The findings of fact show that the business regulated by said Act is a proper subject of regulation by the State in the exercise of its police power.

2. The findings of fact fail to show that any of the provisions of said Act are in excess of what is reasonably required for the public welfare.

3. The findings of fact show that the provisions of the Act are reasonably necessary for the public welfare.

4. The Act does not regulate the price of the sale of merchandise. The price regulation features of the Act extend only to the "finance charge" and is a regulation of "credit costs" as distinguished from "price of merchandise".

5. The commission charged with the duty and authority of regulation under said Act is limited by the Act in the fixing of rates, and for any unwarranted action by it of whatever character the Act specifically provides for a resort to the courts.

6. The Act under the evidence and the findings of fact is a legitimate exercise of the police power and is not a deprivation of due process of law or of equal protection of the laws.

7. The public policy involved is peculiarly for the legislature and not for the court.

II

The District Court of the United States for the Southern [fol. 150] District of Indiana (Indianapolis Division) erred in its second conclusion of law in said case in holding and deciding that the complainant (appellee herein) is entitled to a judgment perpetually enjoining and restraining the defendants (appellants herein) and each of them and their respective agents and employes from in any manner enforcing or threatening to enforce against the complainant (appellee herein) the provisions of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana. The specific points relied upon in support of the foregoing Error No. II are the same as those stated under Error No. I.

III

The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its

decree in granting and issuing the injunction. The specific points relied upon in support of the foregoing error No. III are the same as those stated under Error No. I with the following additional point, namely:

1. The evidence shows that the business of financing retail instalment purchases which is regulated by the Act in controversy affects a considerable portion of the people of the State and that the methods employed and sought to be regulated by the Act operate to the detriment of the retail instalment buyer who pays the cost of the supplying of capital by the finance companies to the retail dealer, but who instead of deriving benefit from competition between finance companies for the retail dealer's business, are placed at a disadvantage by the concealment of "packs" and bonuses as a part of the finance charge and by other methods and that by reason thereof said business directly affects the public welfare and is subject to regulation under the police power.

[fol. 151] IV

The decree of the District Court enjoins the enforcement of the Act as an entirety.

1. This was clearly error. The enforcement of sections 1 to 5 inclusive; sections 21 to 24 inclusive; section 28; a part of section 29; and sections 30 to 35 inclusive would not deprive the appellee of its property without due process of law. The enforcement of the above sections apart from the provisions designed to regulate the cost of credit is clearly intended by the legislature, and the failure, if the court shall so hold, of the sections designed to regulate the cost of credit does not impair the efficacy of the remainder of the Act.

The Parts of the Record to be Printed

Appellants state that the entire record as filed is necessary for the consideration of the case and needs to be printed by the clerk for the hearing of the case.

Philip Lutz, Jr., Attorney General; Joseph W. Hutchinson, Assistant Attorney General, Counsel for Appellants.

[fols. 152 & 153] Proof of Service

The undersigned hereby acknowledges service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed this 20th day of January, 1936.

Smith, Remster, Hombook, Smith, by Paul Y. Davis,
Counsel for Appellee.

[fol. 154] [File endorsement omitted.]

Endorsed on cover: File No. 40,263. S. Indiana, D. C. U. S. Term No. 709. Paul V. McNutt, Governor of the State of Indiana, et al., appellants, vs. General Motors Acceptance Corporation of Indiana, Inc. Filed January 21, 1936. Term No. 709, O. T., 1935.

FILE COPY

JAN 21 193

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 709

PAUL V. McNUTT, GOVERNOR OF THE STATE OF INDIANA, ET AL.,

Appellants,

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA.

STATEMENT AS TO JURISDICTION.

PHILIP LUTZ, JR.,
Attorney General of Indiana,
JOSEPH W. HUTCHINSON,
Assistant Attorney General of Indiana,
LEO M. GARDNER,
Counsel for Appellants.

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IN THE

DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

PAUL V. McNUTT, GOVERNOR OF THE STATE OF INDIANA; PHILIP LUTZ, ATTORNEY GENERAL OF INDIANA; RICHARD A. McKINLEY, DIRECTOR OF THE DEPARTMENT OF FINANCIAL INSTITUTIONS OF THE STATE OF INDIANA; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY AND ROBERT BATTON, MEMBERS OF THE COMMISSION OF FINANCIAL INSTITUTIONS OF THE STATE OF INDIANA; HERBERT M. SPENCER, PROSECUTING ATTORNEY OF THE NINETEENTH JUDICIAL CIRCUIT OF THE STATE OF INDIANA,

Appellants (Defendants),

vs.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED.

Appellee (Complainant).

JURISDICTIONAL STATEMENT.

The above named appellants (defendants) having presented to the United States District Court in and for the Southern District of Indiana, Indianapolis Division, their petition for the allowance of an appeal to the Supreme Court of the United States from the decree of said Court

entered on October 2, 1935, in cause number 1686 in equity, wherein the appellee above named is complainant and the appellants above named are defendants, now concurrently with the presentation of said petition herewith present and file their separate typewritten statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the decree in question, as follows:

A.

The Statutory Provisions Believed to Sustain the Jurisdiction.

The statutory provisions believed to sustain the jurisdiction are—

Section 266 of the Judicial Code, as amended on February 13, 1925 (43 U. S. Statutes at Large 938);
Title 28, U. S. C. A., Sec. 380;
Section 238 of the Judicial Code, as amended on February 13, 1925 (43 U. S. Statutes at Large 938);
Title 28, U. S. C. A. (Pocket Supplement), Sec. 345.

B.

The Statute of the State the Validity of Which is Involved.

The statute of the State the validity of which is involved may be found in the Acts of the 79th Regular Session of the General Assembly of Indiana (Acts of 1935 of the General Assembly of Indiana) beginning on page 1206 and is as follows:

CHAPTER 231.

(H. 377. Approved March 11, 1935.)

AN ACT to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such con-

tracts, to empower the department of financial institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales.

SECTION 1. Definition of Terms.—*Be it enacted by the general assembly of the State of Indiana,* That in this act, unless the context or subject matter otherwise requires:

The term "retail installment sale," or the plural thereof, means and includes every retail contract to sell specific goods and every retail sale of specific goods to any person:

(a) In which the cash price of the goods is not in excess of $1,500, and may be paid in installments over a period of time, and,

(b) In which the seller has taken or retained a security interest in the goods.

The term "person" includes a corporation or partnership or (of) two or more persons having a joint or common interest.

The term "goods" includes all chattels personal other than money, things in action, emblements, industrial growing crops, things so affixed to the land as to become a part thereof, or things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The term "specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

The term "retail" means to dispose of specific goods to, or to acquire specific goods by, a person who may consume such goods for his personal use.

The term "buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person

The term "retail buyer" means a buyer who is a party to

a retail installment sale, or any legal successor in interest of such person, and includes any person who as surety, indorser or guarantor or otherwise is liable on the obligation created by any retail buyer on any retail installment contract.

The term "seller" means a person who sells or agrees to sell goods.

The term "retail seller" means a seller who is a party to a retail installment sale.

The term "cash price" means the price, measured in dollars, agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail installment sale.

The term "retail installment contract" means any written instrument, lawful under this act, which is executed in connection with any retail installment sale and is required by section 2 hereof or is authorized by section 3 hereof, and the term may include all such instruments executed in connection with any retail installment sale.

The terms "contract to sell," "sale" and "conditional sale" shall have the same meaning in this act as they are respectively defined in the Uniform Sales Act and Uniform Conditional Sales Act.

The term "conditional sales contract" means any written instrument evidencing a conditional sale.

The term "bank or trust company" means any national banking association formed under the laws of the United States with its principal office located in this state and doing business herein and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company or trust company organized and doing business under the provisions of any law of this state.

The term "department" means "The Department of Financial Institutions."

The term "manufacturer" means a person who is engaged, directly or indirectly, in the manufacture or distribution of specific goods which may become the subject matter of a retail installment sale in this state.

The term "finance charge" means any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time.

The term "security interest" means a property interest in goods which are the subject matter of a retail installment sale, limited in extent to securing performance of some obligation of the retail buyer or of some third person to the retail seller and includes the interest of a mortgagee of the goods and the title to the goods whether or not expressed to be absolute, whenever such title is, in substance, retained for security only.

SEC. 2. Written Instrument.—Every retail installment sale shall be evidenced by an instrument in writing signed by the retail buyer, and a copy thereof shall be delivered to him by the retail seller at the time of its execution. An acknowledgment of the delivery thereof contained in the body of the instrument shall be conclusive proof of delivery in any action to enforce any obligation arising out of the retail installment sale. The written instrument shall contain all of the agreements of the parties made with reference to the specific goods which are the subject matter of the retail installment sale, and shall set forth specifically all items and matters required by this act. The reference to insurance shall recite generally the type or types of insurance the retail seller has agreed to procure for the retail buyer but such reference to insurance shall not be construed to imply the scope of the coverage, the terms, exceptions, limitations, restrictions or conditions of the contract or contracts of insurance to be furnished. Nothing in this act shall be con-

strued to require the retail seller to comply with the provisions hereof at any time prior to the delivery of the specific goods to the retail buyer.

SEC. 3. Retail Installment Contracts.—Any retail seller may require any retail buyer to execute and deliver a promissory note to evidence the indebtedness created by any retail installment sale, and, to secure the payment of the indebtedness created by the sale or evidenced by the promissory note or to secure the performance of any other condition of the sale, may require the retail buyer to execute and deliver a conditional sale contract, chattel mortgage or other instrument to give the retail seller a security interest in the specific goods which were the subject matter of the retail installment sale. A written instrument required by section 2 hereof may evidence a conditional sale.

SEC. 4. Provisions of Written Instruments.—Every written instrument evidencing a retail installment sale shall recite the following separate items as such and in the following order:

(1) The cash price of the specific goods.

(2) The amount in cash of the retail buyer's down payment, whether made in money or goods or partly in money or partly in goods.

The term "down payment" for the purpose of this section, shall mean that part payment of the cash price required by the retail seller as a condition to the delivery of the specific goods sold or to be sold or to the extension of credit to the retail buyer for any portion of the cash price.

(3) The unpaid balance of the cash price payable by the retail buyer to the retail seller which is the difference between items (1) and (2).

(4) The cost to the retail buyer of any insurance the retail buyer has agreed to procure, if the retail seller has agreed to purchase the insurance and extend credit to the retail buyer for the price thereof.

(5) The principal balance owed on the retail installment contract which is the sum total of items (3) and (4).

(6) The amount of the finance charge.

(7) The time balance owed by the retail buyer to the retail seller and the number of installment payments required and the amount and date of each payment necessary finally to pay the time balance which is the sum total of items (5) and (6).

Item (4) and item (6) may be added together and stated as one sum in the written instrument and if so stated item (5) may be omitted, but in such event the retail seller shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract a statement reciting the separate amounts of items (4) and (6).

SEC. 5. The Insurance.—Any retail seller who, in any retail installment contract, has agreed to purchase insurance for the retail buyer and to extend credit for the price thereof, shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract, a policy or policies of insurance or in lieu thereof a certificate briefly describing the protection afforded by the insurance procured, and the kind and amount thereof. If the premium for insurance of like kind and amount, as fixed in the published manual of a recognized standard rating bureau designated by the retail seller, is less than the amount charged the retail buyer as fixed in the written

instrument in compliance with item (4) of section 4 hereof, the retail buyer may deduct an amount equal to the difference from the amount of the last payment owed the retail seller. If, before the sale, assignment or transfer of the retail installment contract, the retail seller has not purchased the insurance for the retail buyer which the former, under the terms of the retail installment contract, is required to purchase, any licensee hereunder who becomes the owner, assignee or transferree of the retail installment contract shall, within twenty-five days after the execution of the assignment, purchase the insurance and mail the policies or certificates, instead of the retail seller as required above, and may, subject to the provisions of this section, collect and receive the amount of the cost thereof which was included as a part of the principal balance on the retail installment contract.

SEC. 6. The Finance Charge and Prepayment.—Subject to the provisions of this act, any retail seller at the time of making any retail installment sale may contract for the payment of a finance charge by the retail buyer and collect and receive the same. The finance charge contracted for in any retail installment contract may not exceed the maximum finance charge then authorized by the department as in this act provided. Every retail buyer shall have the right, at any time, to pay the then unpaid time balance owed on any retail installment contract, whether then due or not, and upon payment thereof, any holder of the retail installment contract shall reduce the amount of the then unpaid time balance by the amount fixed and determined in accordance with the regulations of the department in force as of the date of the making of the particular retail installment contract and applicable to such cases. The reduction herein authorized may be known as a discount and every retail buyer, upon full prepayment of any unpaid

time balance owed by him on any retail installment contract, shall receive the discount but only in the amount, at the times and upon the conditions provided herein. The department shall and is hereby authorized to fix and determine the amount of any discount to be given for prepayment as in this section authorized but no such discount shall be for an amount in excess of the amount of the finance charge on any particular retail installment contract.

Every retail seller may, at the time of making any retail installment sale, contract for the payment by the retail buyer of lawful delinquent charges for failure to pay any installment of the time balance on the date specified in the retail installment contract, and any retail seller or any lawful holder of a retail installment contract in which delinquent charges are contracted for may collect and receive the charges lawfully contracted for.

SEC. 7. Limitation on Amount of Debt and Charges.—No retail installment contract authorized by section 3 of this act which is executed in connection with any retail installment sale shall evidence any indebtedness in excess of the time balance fixed, in the written instrument in compliance with item (7) of section 4 of this act, but it may evidence in addition, any agreements of the parties including agreements for the payment of delinquent charges, taxes and fees, including attorney's fees. No retail seller, directly or indirectly, shall contract for or receive from any retail buyer, as consideration for the extension of credit to the retail buyer for the amount of the principal balance, any further or other amount whatsoever for examination, service, brokerage, commission, expense, fee or other thing of value than the finance charge, charges and fees permitted by this act, taxes on account of any retail installment contract or on specific goods sold thereunder and any lawful fees actually paid out by the retail seller to any public

officer for filing or recording or releasing any instrument securing the payment of the obligation owed on any retail installment contract. The lawful fees may be collected when the retail installment contract is made or at any time thereafter, but may not be included in the principal balance fixed in the written instrument in compliance with item (5) of section 4 hereof.

SEC. 8. Limitation on Recovery and Enforcement of Lien. —No retail installment contract which evidences an indebtedness greater than allowed by section 7 hereof and no retail installment contract in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable against any retail buyer for any amount in excess of the principal balance thereof and no security interest created by any such retail installment contract in connection with which an indebtedness is evidenced which is greater than allowed by section 7 hereof or in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable for an amount in excess of the principal balance against any retail buyer in default under the terms of the retail installment contract.

SEC. 9. Limitation on Assignment of Contracts.—Except as in this section otherwise provided, every retail installment contract shall be assignable and the interest therein transferable to any person or persons. No retail seller may sell, assign and transfer any retail installment contract to any person other than a licensee under this act. Any retail installment contract which is or has been owned by a licensee may be enforced and collected by the holder thereof according to its lawful terms.

SEC. 10. Purchase of Retail Installment Contracts.—Any licensee hereunder may purchase any retail installment

contract on such terms and conditions not inconsistent with the provisions of this act, and at such price and upon such terms as to the payment of the price, as may be agreed upon between the licensee and the retail seller. The records of the licensee shall show the price actually paid for retail installment contracts separately assigned to such licensee but retail installment contracts may be assigned in group or in bulk to any licensee as may from time to time be authorized by the department by regulation without disclosing the purchase price of the individual retail installment contracts. The department is authorized to make regulations from time to time concerning the purchase by licensees of retail installment contracts in group or in bulk and any purchase of such retail installment contracts made within the terms of the regulations shall not be construed as an attempt to avoid the operation and effect of this act.

No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract

if such buyer in such contract defaults and such goods are repossessed.

The provisions of this section shall not apply to any bona fide loan made to any retail seller which the retail seller is under an unqualified duty to repay as such, and which he has secured as to payment, by the sale, assignment, or transfer of retail installment contracts to the lender.

SEC. 11. Licensees.—No person shall purchase retail installment contracts from a retail seller doing business in this state or engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or trust company, make loans to a retail seller doing business in this state on the security of retail installment contracts or engage in the business of making loans to retail sellers in this state on the security of retail installment contracts unless the department has licensed such person to do such business and has issued to the person a written instrument evidencing the license as in this act provided. Any person who desires to purchase retail installment contracts from retail sellers doing business in this state or to engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or a trust company, to make loans to retail sellers doing business in this state on the security of retail installment contracts or to engage in the business of making loans to retail sellers doing business in this state on the security of retail installment contracts, shall file an application for a license on forms prescribed by the department and pay the fees required herein.

SEC. 12. Application for License and Fees.—The application for license shall contain:

(a) the name and address of the principal office of the applicant,

(b) if applicant has one or more branches operating in this state, the place of business of each such branch at the date of the application,

(c) the trade name, if any, under which applicant's business is to be conducted, and if applicant is a co-partnership, the name of every member thereof, and if a corporation, of each officer and director thereof,

(d) the total authorized investment used or to be used in the business in this state and if a corporation, the amount of the capital stock thereof issued and outstanding,

(e) a statement of the total amount of business transacted by it in this state during the fiscal year next preceding the date of the application,

(f) such other information touching the business of the applicant as the department may require.

The department is hereby authorized to prescribe the forms of the application and require such additional information as to it may seem necessary properly to regulate the business of the licensee. The forms prescribed shall require the applicant to agree to give notice to all retail sellers in this state with which it does business, when requested so to do by the department, of any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges as provided in section 26 of this act and to keep in this state, subject to examination, adequate records pertaining to the business done in this state.

The application shall be verified by the proper person and every applicant, other than a bank or trust company or an industrial loan and investment company authorized to issue certificates of indebtedness or investment, shall pay the department the sum of one hundred dollars as an annual

license fee at the time of the filing of the application. Any bank or trust company or industrial loan and investment company authorized to issue certificates of indebtedness or investment which shall apply for a license under this act shall pay the department the sum of ten dollars as an annual license fee at the time of filing of the application. If the period for which the license is to run is less than six months (,) one-half of the annual fee shall be charged. On or before the 20th day of June in each year every licensee shall pay the department the annual license fee provided herein for such licensee for the year commencing on the next succeeding July 1 and shall file an application in the form prescribed by the department. All license fees collected by the department shall be paid into the state treasury and become a part of the financial institution's fund and subject to the provisions of law relating thereto.

SEC. 13. Approval or Rejection of Application.—Upon the filing of any application for license and the payment of the license fee required by this act, if the department shall find that the applicant can operate its business economically and efficiently, it shall thereupon issue and deliver a license to the applicant. In considering economic and efficient operation the department shall take into consideration the fact that this act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope. The license shall authorize the applicant to do the business otherwise prohibited by this act. The license shall remain in full force and effect until it is surrendered, revoked or suspended as in this act provided. If the department shall find that the applicant cannot operate its business economically and efficiently within the scope of this act, it shall not issue a license to the applicant but shall notify the applicant of the denial, and return to the applicant the fee theretofore paid. The

department shall give every applicant a reasonable opportunity to be heard with respect to the application, and shall approve or deny, by written order, every application for license hereunder within thirty days from the hearing thereon.

SEC. 14. Form of License.—The instrument evidencing the license shall be in such form as may be prescribed by the department, and in addition thereto shall contain the following:

(a) the name of the person licensed,

(b) the name of all partners if applicant is a co-partnership,

(c) the principal office of the applicant.

The instrument evidencing the license, or a certified copy thereof provided by the department, shall be kept posted conspicuously in the principal office of applicant and in every branch maintained and operated by applicant in this state.

SEC. 15. Revocation of License.—The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:

(a) that the licensee has refused to permit the department to make any examination authorized hereunder or has failed to pay the cost of any examination made by the department or the annual license fee required hereby or any penalty assessed by the department against the licensee, or

(b) that the licensee has wilfully failed to comply with any rule or regulation of the department lawfully made hereunder, or

(c) that the licensee has wilfully violated any provision of this act, or any rule or regulation of the department lawfully made hereunder, or

(d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination or understanding (,) express or implied (,) with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.

The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee (license) may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operated by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made.

SEC. 16. Recourse to Court.—Any person feeling aggrieved with any decision of the department made as in this act provided may commence an action in the circuit or superior court of the county in which the business operated by such person is located against said department as defendant to vacate or set aside any such order or decision of the department upon the grounds that any such regulation, order or decision of the department is insufficient, unreasonable or unlawful, in which action a copy of the complaint shall be served with the summons. The answer of the department to the complaint shall be filed within ten

days after service of summons. All such actions shall have precedence over civil cases not of the same nature pending in any such court and such circuit or superior court shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions.

Any such proceeding, action or suit to set aside or vacate any decision or order of the department or to prevent in any way such order or decision from becoming effective shall be commenced and every right of recourse to the courts shall be exercised within thirty days after the entry or rendition of such order or decision and the right to commence any such action, proceeding or suit or to exercise the right of any recourse to the courts shall terminate absolutely at the end of such thirty days after such entry or rendition thereof. Either party to any such action in the circuit or superior court shall have a right of appeal to the supreme court of the State of Indiana as in other civil cases.

SEC. 17. Surrender of License.—Any licensee hereunder may surrender any license theretofore issued to it by the department at any time after ten days' notice to the department in writing stating that the licensee proposes to and does thereby surrender the license as of a certain effective date named. The surrender of a license by a licensee shall not affect the civil or criminal liability or liability for fees or penalties which the licensee may be under by virtue of any act done prior to the surrender of the license.

SEC. 18. Reports of Licensees.—Every licensee hereunder shall annually on or before the 15th day of March file a report with the department giving such relevant information as the department may require concerning the business and operation of the licensee in this state during the preceding calendar year. The report shall be made under oath and in the form prescribed by the department.

SEC. 19. Examination of Licensees.—The department may at any time investigate the business done in this State by any licensee hereunder, and for that purpose examine the books, accounts, records and files used and maintained by such licensees and their agents, brokers or other representatives. The department may also investigate the business of any person who is not a licensee hereunder and who is doing any business or act, the doing of which is prohibited hereby to persons other than licensees or banks or trust companies. For the purpose of discovering violations of this act and procuring information necessary to fix a maximum finance charge applicable to retail installment contracts, the department in making investigations authorized by this section shall have access to all books, accounts, papers, records, files, safes and vaults of any persons being examined, and may require such persons to attend and testify relative to any transactions or business which may come within the scope of this act. In case of the disobedience on the part of any person to comply with any lawful order of the department or any lawful subpœna, or upon the refusal of any witness to appear and testify to any matter regarding which he may be lawfully interrogated, upon petition of the department setting forth the facts, it shall be the duty of the circuit or superior court of the county of which such person is a resident, or the judge thereof in vacation, to compel obedience to the lawful requirements of the subpœna or order and to compel the production of necessary and required books, papers, records, documents and other evidence, and upon the failure, refusal or neglect of any person to comply with the order of the court or the judge thereof, such person shall be punished as for contempt of court.

SEC. 20. Costs of Examination.—The department shall prescribe and fix a schedule of fees, which are hereby im-

posed and shall be charged and collected by the department, for the services rendered and the duties performed by the department, under and by virtue of the provisions of this act in the supervision, regulation and examination of licensees hereunder and the schedule of fees so prescribed and fixed shall be determined in accordance with the provisions of section 35 of the Indiana Financial Institutions Act. For the purposes of this section a licensee hereunder shall be termed a financial institution. The fees fixed and prescribed in the schedule may include the cost incurred by the department in fixing a finance charge under the provisions of this act. No licensee shall be required to pay any fee for examination unless the cost to the department of making such examination shall exceed the license fee paid in compliance with the provisions of this act. All costs assessed by the department at the time of the making of any examination and paid by the licensee shall be paid into the State treasury and become a part of the financial institutions fund and subject to the provisions of law relating thereto. If any licensee refuses to permit the department to make an examination it shall be subject to such penalty as the department may assess, not in excess of one hundred dollars for each day any such refusal shall continue. Any penalty assessed by the department may be collected in an action brought in the name of the State of Indiana on the relation of "The Department of Financial Institutions" in the circuit or superior court of the county in which the licensee has its principal place of business.

SEC. 21. Contracts to Prevent Competition.—No manufacturer shall sell or contract to sell specific goods which may become the subject matter of a retail installment sale in this State, whether patented or unpatented, to any retail seller in this State on the condition or with an agreement or understanding, express or implied, that the retail seller

shall sell, assign or transfer any retail installment contracts arising from the retail installment sales of the goods, or any part thereof, only to a designated licensee or class of licensees, when the effect of the condition, agreement or understanding may be to lessen or eliminate competition, or create, or tend to create, a monopoly in the licensee or class designated. Any such condition, agreement or understanding with any retail seller in this State is hereby declared to be against the public policy of this State and to be unlawful and void.

SEC. 22. Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly, to any retail seller in this state by any manufacturer that the manufacturer will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell, specific goods which may become the subject matter of a retail installment sale in this state, whether patented or unpatented, to the retail seller, unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to any designated licensee or class of licensees, shall be prima facie evidence that the manufacturer has sold or intends to sell such specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 23.—Further Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly to any retail seller in this state by any licensee hereunder that is affiliated with or controlled by any manufacturer that the manufacturer will terminate his contract with or cease to sell specific goods which may become the subject matter of a retail installment sale to the retail seller unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to the licensee making the threat, shall be presumed to be made at

the direction of and with the authority of the manufacturer and shall be prima facie evidence of the fact that the manufacturer has sold or intends to sell the specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 24. Subsidy of Licensees.—No manufacturer shall pay or give or contract to pay or give any thing or service of value to any licensee in this state, and no licensee in this state shall accept or receive or contract or agree to accept or receive, directly or indirectly, any payment, thing or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service of value by the manufacturer, or the acceptance or receipt thereof by the licensee, may be to lessen or eliminate competition or tend to create or create a monopoly in the licensee that accepts or receives the payment, thing or service of value or contracts or agrees to accept or receive the same.

SEC. 25. Rules and Regulations.—The department shall have authority from time to time to make, amend and rescind rules and regulations necessary to carry out and enforce the provisions of this act, including rules and regulations governing the business done in this state by licensees, the content of reports required from licensees and the manner and extent of examinations made of the business of licensees. Among other things, the department shall have authority to prescribe forms in which required information shall be set forth, items or details to be shown in balance sheets and earning statements and methods to be followed in the preparation of accounts necessary to reflect factors in the business of the licensee to be reckoned with by the department when fixing a maximum finance charge on retail installment contracts. The rules and regulations of the department, other than those issued pursuant to the authority vested in the department by section 26 of this act, shall

be published and be effective in the manner and at the time prescribed by the department. No provision of this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the department, notwithstanding that the rule or regulation may, after the act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

SEC. 26. Classification of Retail Contracts and Variable Finance Charges.—It shall be the duty of the department and the department shall have power, jurisdiction and authority to investigate retail installment contracts and ascertain the facts with reference to retail installment sales and upon the basis of the ascertained facts:

(a) to classify, by general order, retail installment sales or retail installment contracts arising therefrom, according to such system of differentiation as may reasonably distinguish the classes of retail installment sales or the contracts made in connection with such sales, and

(b) to determine and fix by a general order the fair maximum finance charge that may be contracted for in any retail installment contracts or that may be contracted for in retail installment contracts of any classes which may be established by the department, and

(c) to determine and fix by a general order the fair maximum charges that may be contracted for in any retail installment contract and which may be imposed upon the retail buyer for failure to pay any installment of the time balance when it is due.

The department, in determining the classes of retail installment sales or contracts, shall take into consideration the specific goods sold thereunder, the use thereof, the length of time usually given to the retail buyer in which to

pay the unpaid balance owing on any retail installment contracts made in connection with the sales and any other factors which may reasonably afford a basis for the application of different finance charges on retail installment contracts which have or are likely to have the same or substantially the same unpaid balances.

The department, in determining the fair maximum finance charge which may be contracted for in any retail installment contracts or in any retail installment contracts of any classes which may have been established by it, shall take into consideration the availability of credit facilities to individuals who do not have the security generally required by commercial banks and the finance charge which will be necessary in order to induce sufficient amounts of efficiently operated commercial capital to enter into the business of making and purchasing retail installment contracts. The department shall fix charges sufficient to provide adequate credit facilities for retail installment sales.

The department may, from time to time, upon the basis of changed conditions or facts, reclassify retail installment sales and retail installment contracts, and redetermine and refix any maximum finance charge previously fixed by it, but the new finance charge shall not affect pre-existing retail installment contracts lawfully made. Any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges shall fix the effective date of the new or changed classification or finance charge, but the effective date shall not be earlier than thirty days after the date when notice of such new or changed classification or finance charge is published. Notice to the public, to retail sellers and to licensees hereunder shall be given by publication of the new or changed classification or finance charge by one publication in a daily newspaper of general circulation printed and published in the English language in the city of Indianapo-

lis. In addition, the department may require licensees hereunder to give notice of such new or changed classification or finance charge to all retail sellers with whom the licensees do business in this state.

Any finance charge fixed by the department under the provisions of this act shall be lawful notwithstanding any other law of this state.

SEC. 27. Duty of Retail Seller and Licensee.—Every person to which this act is applicable shall conduct and transact his business in the manner required hereby and every licensee hereunder shall establish and maintain methods for the conduct of his business and affairs coming within the scope of this act in accordance with the requirements hereof and of any rule or regulation of the department made in relation thereto and under the authority of this act.

SEC. 28. Waiver of Statutory Protection.—No agreement of any retail buyer before or at the time of the making of any retail installment contract shall constitute a valid waiver of any provisions of this act.

SEC. 29. Violation of Act—Punishment.—Any person who wilfully violates any of the provisions of this act, or the rules and regulations promulgated by the department under the authority hereof or any person who wilfully in any report or account filed in pursuance of any provision of this act or rule or regulation of the department makes any untrue statement of a material fact or omits to state any material fact necessary to give the department the information lawfully required by it, shall upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year or both.

SEC. 30. Interpretation.—This act shall be interpreted and construed in connection with and as supplemental to the Uniform Sales Act, as amended, and the Uniform Con-

ditional Sales Act and any terms used in this act which are defined in either of said acts shall have the meaning given thereto by the aforementioned acts unless the context hereof clearly requires another meaning. Nothing in this act shall be construed to repeal any part of either of the acts mentioned in this section or any existing law of this state relating to interest or consideration that may be charged upon the loan, use or forbearance of money or sale of credit, but this act shall be construed as supplemental thereto.

SEC. 31. Existing Contracts.—None of the provisions of this act shall apply to any sale or to any contract to sell made prior to the taking effect of this act which if made after this act takes effect would be a retail installment sale or contract and this act shall not affect pending litigation.

SEC. 32. Captions.—No caption of any section of this act shall in any way affect interpretation of this act or any part thereof.

SEC. 33. Severability Clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 34. Short Title.—This act may be cited as the Retail Installment Sales Act.

SEC. 35. Time of Taking Effect.—This Act shall take effect on the first day of July, 1935.

C.

The Date of the Decree Sought to be Reviewed and the Date Upon Which the Application for Appeal is Presented.

The date of the decree sought to be reviewed is October 2, 1935.

The date upon which the application for appeal is presented is December 23, 1935.

D.

Statement Showing that the Nature of the Case and the Rulings of the Court are Such as Bring the Case Within the Jurisdictional Provisions Relied On.

The action in this case was for an interlocutory and permanent injunction for the purpose of suspending and restraining the enforcement, operation and execution of a statute of the State of Indiana, being the Act above referred to, by restraining the action of the appellants (defendants) as officers of said State in the enforcement and execution of said statute upon the ground that said statute violates Section 1 of Article XIV of the Amendments to the Constitution of the United States and that its enforcement will deprive complainant of its property without due process of law and deny it the equal protection of the laws in violation of said provision of the Constitution. (See Bill of Complaint.)

A three-judge Court was convened pursuant to Section 266 of the Judicial Code as amended on February 13, 1925, and the application for an interlocutory injunction was submitted to it and evidence heard. (See entry of July 3, 1935.) Thereafter a final decree was entered. (See entry of October 2, 1935.) The appeal in this case is from the

final decree of the three-judge Court permanently enjoining the appellants (defendants) from enforcing or attempting to enforce against appellee (complainant) any of the provisions of the Act of the General Assembly above set out, being Chapter 231 of the Acts of the General Assembly of the State of Indiana at its 79th Regular Session, on the ground that said Act is unconstitutional and void in that it deprives complainant of its property without due process of law. (See Conclusions of Law and entry of October 2, 1935.)

E.

The Cases Believed to Sustain the Jurisdiction of the Supreme Court.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

Smith et al. v. *Wilson et al.*, 273 U. S. 388;
Stratton, etc., v. *St. Louis Southwestern Railway Company*, 282 U. S. 10;
Brucker v. *Fisher*, 49 F. (2d) 759.

Respectfully submitted,

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FILE COPY

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1935.

PAUL V. MCNUTT, Governor of the State of Indiana,
PHILIP LUTZ, Attorney General of Indiana,
RICHARD A. MCKINLEY, Director of the Department of Financial Institutions of the State of Indiana,
OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSOR, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana,
HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Appellee.

No. 709.

APPELLANTS' BRIEF.

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IN THE

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HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Appellee.

No. 709.

APPELLANTS' BRIEF.

I.

THE OPINION OF THE COURT BELOW.

No opinion was written by the court below.

II.

STATEMENT OF THE CASE.

This case was begun in the court below by the appellee by filing its Bill of Complaint in Equity, (R. pp. 1-28) seeking relief by injunction against the enforcement by the appellants of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana on the ground that said Act is unconstitutional.

A three-judge court was convened pursuant to Section 266 of the Judicial Code as amended on February 13, 1925, for the purpose of hearing appellee's application for an interlocutory injunction and the evidence was heard upon said application. (R. pp. 30, 45.) Thereafter, with the application for an interlocutory injunction undecided but not withdrawn, additional affidavits were introduced in evidence, upon which evidence including the affidavits introduced upon the application for an interlocutory injunction, the court found the facts specially and stated conclusions of law thereon and entered a final decree in harmony with such conclusions permanently enjoining the appellants from enforcing or attempting to enforce against appellee any of the provisions of said Act. (R. pp. 45-71.)

THE CONCLUSIONS OF LAW.

The court below did not write an opinion, simply stating its conclusions of law upon the facts found, to which conclusions appellants are obliged to go to ascertain the exact ground for the decree. These conclusions are as follows:

> "1. That Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of In-

diana is unconstitutional and void in that it deprives complainant of its property without due process of law.

"2. That plaintiff is entitled to a judgment perpetually enjoining and restraining the defendants and each of them and their respective agents and employees from in any manner enforcing or threatening to enforce against complainant the provisions of said Act." (R. pp. 70-71.)

THE ACT.

For the convenience of the court the Act assailed is set out in its entirety in appendix "A." This Brief pages 45-69.

THE RESPECTIVE CLAIMS OF THE PARTIES.

It was claimed by the appellee that said Act is unconstitutional and void in that it denies to it the rights guaranteed by Section 1 of Article XIV of the Amendments to the Constitution of the United States. The appellants, on the other hand, claimed and now claim that the Act does not violate the foregoing constitutional provision but is a valid exercise of the police power of the State.

THE BASIS OF APPELLANTS' CLAIM.

Briefly stated appellants' claim was based upon the following factual situations shown by the evidence and found by the court in its findings of fact, namely:

(1) The business of financing retail installment sales and the charge for the extension of credit involved therein including the method of "setting up" such charges were accompanied by abuses which were detrimental to the public welfare and, in the promotion of the public welfare, required regulation.

This need was emphasized by the further fact that by reason of the method employed the ordinary usury statute was wholly inadequate and unsuited to the correction of said abuses.

THE FACTUAL BASIS FOR REGULATION.

(*The findings of fact.*)

It is unnecessary in this statement to make a complete analysis of all the findings of fact which are quite lengthy. The following facts bear directly upon the legal questions involved:

(1) The Department of Financial Institutions is a department of government of the State of Indiana created under the Indiana Financial Institutions Act, Acts of the General Assembly 1933, Chapter 40, Sections 1 and 4. The function of the Department is to supervise, regulate and control the business of banks, trust companies, building and loan associations and other credit agencies, as well as small loan licensees furnishing money in amounts of $300.00 or less. From the time it was established on July 1, 1933, it received complaints from different persons directed against various types of financial institutions, including companies engaged in the same business in which GMAC is engaged, and because of the complaints and in pursuance of its power of investigation, the Department began a study of consumer credit agencies operating in Indiana, the result of which was contained in a report published and presented to the 79th Session of the General Assembly of the State of Indiana, which report was entitled "Indiana Consumer Finance Agencies." The report was not limited simply to finance companies, but included all agencies theretofore under the supervision of the Department, in so far as those agencies and companies supplied credit to consumers, as well as installment

sellers who hold their own paper and companies engaged in the same business in which GMAC is engaged. A considerable portion of the report was devoted to finance companies and what the report characterized as their "effective rates of interest for the extension of credit," the desirable and undesirable features of the business, as well as the undesirable features of instalment selling by dealers who hold their own paper, and the recommendations of the Department for legislation to restrict the original contract between buyer and seller, as well as supervise finance companies. (R. pp. 61-62.)

(2) The variation of the amount of the finance company's discount for purchasing a retail instalment sale contract for twenty companies in Indiana on the identical unpaid balance of $300.00 on the purchase on instalments of a new automobile ranged from $28.00 to $60.00 for one year. *These amounts in terms of interest based upon the diminishing unpaid balance ranged from 18.7% to 44.4% per annum.* On used automobiles for the same unpaid balance for the same period of time the amounts ranged from $35.00 to $85.20, and *these amounts in terms of interest similarly computed ranged from 23.9% to 69% per annum.* These amounts included the cost of insurance for the retail buyer. The types of insurance coverage, the cost of which was included in these various amounts, is not disclosed by the evidence, nor the amount of the coverage. Insurance costs vary in amount according to types of coverage, make of car, zone in which kept and amount for which insured, and this variable factor and others mentioned such as credit risk, loss hazard, and cost of collection account for part of the variation in amounts, the extent of which can not be determined by the evidence. (R. pp. 63-64.)

(3) Prior to the enactment of the Retail Instalment Sales

Act, the Act under consideration, the finance charge was represented to include cost of insurance, but *the actual cost of the insurance, as distinguished from the remaining part of the finance charge, might not be known to the retail seller or to the retail buyer.* (R. pp. 62-63.)

(4) The form of contract supplied to the retail seller by the finance company contemplated the sale of the merchandise at whatever price was agreed upon by the parties and that price was known as "the time price." *No separate item appeared in the contract as the time price differential,* and the said differential included in the total time price was not translated into percentage calculations based upon the unpaid cash balance. (R. p. 63.)

(5) The Department of Financial Institutions in its report to the Governor and the General Assembly recommended that the cost of the credit extension, as the term is used in the report, be separated from the cost of insurance and expressed in terms of a rate per cent per month based upon the diminishing unpaid balance of the price of the merchandise. This recommendation was made to give the retail buyer a comparative cost basis. (R. p. 66.)

(6) Most finance companies furnish retail dealers with blank forms of conditional sale contracts, rate charts and work sheets, whereby the retail seller may easily compute the amount of the so-called time-price. *Some finance companies have many different rate charts for the same new car as well as for old ones.* (R. pp. 57-59.)

(7) The practice of rebating is engaged in by some finance companies. This is a practice whereunder, by special agreement with the retail seller, the finance company furnishes him

with its regularly authorized rate chart but agrees to and pays the retail seller a certain amount in cash on each contract accepted by the finance company. This amount goes to the retail seller without any restrictions whatsoever. *Any rebate paid to the dealer increases the so-called time-price to the buyer.* (R. pp. 66, 67.)

(8) The practice of adding to the finance charge an additional amount known as "dealers pack" exists only in the case of the instalment sale of automobiles. *This amount usually ranges from $10.00 to $25.00 although in some instances it may reach $40.00 or more. The retail buyer is not informed as to what this item is, and may be led to believe that the whole amount added to the unpaid balance, including the pack, is retained by the finance company. In practice, however, the finance company collects but does not retain the pack. It is collected by the dealer from the finance company at the time of the sale of the contract, or, in some instances after the contract has been fully paid, the amount is credited to the reserve account of the dealer with the finance company.* (R. p. 67.)

(9) Forms of contracts supplied to retail sellers by finance companies generally contain no provision for a return of any part of the finance charge to the buyer in the event he wishes to prepay the contract. Where the finance company has already paid the amount of the pack or rebate to the dealer, in order to re-imburse itself it must collect these amounts from the retail buyer. (R. pp. 67, 68.)

(10) Every finance company and retail seller recognizes that losses will occur and to compensate the finance company as assignee of the retail instalment contract and the retail seller as the original party thereto for such losses, there is included in

the differential or discount fixed by the finance company in the rate or payment charts, an amount which may be set aside as a reserve for losses. This amount is included in the differential or discount irrespective of the type of assignment which the finance company requires from the retail seller. Out of the reserve the retail seller and finance company are compensated for losses which occur, and a division of the item may be made between them according to the proportion of the risk of loss borne by each. (R. p. 60.)

(11) Most of the instalment sale contracts purchased by GMAC from dealers involve purchases where the cash price is less than $1500.00. (R. p. 47.) The extent of its purchases for the first six months of 1935 in Indiana exceeded $4,000,000.00. (R. p. 70.)

(12) There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts. (R. p. 69.)

III.

SPECIFICATIONS OF ERROR.

The ultimate error assigned is that the District Court erred in holding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives the appellee of its property without due process of law. The detailed specifications of

error (all of which are intended to be urged here) are set forth in the assignment of errors, and are as follows:

(1) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its first conclusion of law in said case in holding and deciding that Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is unconstitutional and void in that it deprives complainant of its property without due process of law.

(2) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its second conclusion of law in said case in holding and deciding that the complainant is entitled to a judgment perpetually enjoining and restraining the defendants and each of them and their respective agents and employes from in any manner enforcing or threatening to enforce against the complainant the provisions of Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana.

(3) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in its decree in granting and issuing the injunction herein.

(4) The District Court of the United States for the Southern District of Indiana (Indianapolis Division) erred in failing to find as a fact and in disregarding the same in its conclusions of law and decree that the business whose regulation is provided for by Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of the State of Indiana is designed for use by and is used by a considerable portion of the people of the State in financing of retail instalment purchases; that such business and the methods of transacting the same operate to

the detriment of the retail instalment buyer who pays the cost of the supplying of capital by the finance companies to the retail dealers but who, instead of deriving benefit from the competition between finance companies for the retail dealers' business, are placed at a disadvantage by the concealment of "packs" and "bonuses" as a part of the finance charge and by other methods shown by the evidence; and that by reason thereof said business directly affects the public welfare and is subject to regulation under the police power. (R. pp. 72, 73.)

IV.

SUMMARY OF ARGUMENT.

1. The findings of fact show that the business regulated by Chapter 231 of the Acts of the 79th regular session of the General Assembly of Indiana is a proper subject of regulation by the state in the exercise of its police power. Findings Nos. 22-31 inclusive. (R. pages 62-69.)

The purpose of the Act, as is evident from a consideration of its provisions, is to prevent extortionate and unreasonable prices for credit extended in retail installment sales of goods of a sale price less than $1500 where the obligations of the sellers and buyers are evidenced by conditional sales contracts and by such other instruments as in the act are termed "retail installment contracts," and to prevent certain practices, in their nature fraudulent, which have arisen out of the combination of the retail seller and the finance company in the modern business of sales financing. Appendix "A," pages 45-69 of this brief.

2. It is not the purpose of the Act to fix the price of any goods sold by a retail seller and which is the subject of a retail

installment sale contract; nor can the Act be so construed as to exhibit such an intention of the legislature.

There is no provision in the Act under consideration which purports to fix or to authorize the fixing of the price of the merchandise. The Act expressly provides that the price of the merchandise referred to in the Act as the "cash price" means the price agreed upon by the parties without limitation as to the factors which may be taken into consideration in making the agreement. Appendix "A," page 46 of this Brief.

3. The foregoing construction, which is clearly expressed in the Act, operates as a complete avoidance of the constitutional pitfalls involved in the case of any attempt to fix the price of merchandise generally and makes the authorities on such subject wholly irrelevant; and if objection be made to the construction, such objection is fully met by the principle that the court, in the construction of a statute will, if possible, give it a construction in harmony with constitutionality.

Panama R. Co. v. Johnson, 264 U. S. 375 at p. 390;
United States v. Jin Fuey Moy, 241 U. S. 394;
United States v. Delaware Hudson Co., 213 U. S. 366 at pp. 407-408;
Ashwander et al v. Tennessee Valley Authority, Octo-October Term 1935;
Crowell v. Benson, 285 U. S. 22 at p. 62.

4. The General Assembly of Indiana might well have considered that extortionate charges for credit in retail installment sales and the use of hidden excess charges as shown by the findings prevailed in Indiana, and that legislation to overcome the same was in the interest of the public welfare of the citizens of

the State of Indiana. Findings Nos. 22-31 inclusive. (R. pages 62-69.)

It was evident to the legislature from the decisions of the courts that the usury laws were inadequate to cope with the cost of credit in transactions of this character, and it was equally evident that the legal device of time price, based as it is upon the right to sell merchandise at any price parties may agree upon, could not be left untouched if any remedy was to be provided for the factual situation revealed above. It was, therefore, reasonable for the legislature to enter the field of fixing the cost of credit.

Griffith v. Connecticut, 218 U. S. 563;
Munn v. Illinois, 94 U. S. 113;
Brass v. North Dakota, 153 U. S. 391;
German Alliance Insurance Co. v. Lewis, 233 U. S. 389;
Hall v. Geiger-Jones Co., 242 U. S. 539;
Chesapeake & Potomac Tel. Co. v. Manning, 186 U. S. 238 at p. 245;
Nebbia v. People etc., 291 U. S. 502.

5. Since the purpose of the legislation is valid and within the exercise of the police power of the state, due process is not denied by legislation authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment for use in retail installment sales, as provided in sections 6 and 26 of the Act.

The plan of the statute was to start at the point where the legal device of time-price leaves off, thereby permitting the parties to fix the price of merchandise where they pleased, and requiring as a condition to the right to discount the paper, the

sale thereof only to persons who have been licensed to buy such paper.

Nebbia v. People etc., 291 U. S. 502;
German Alliance Insurance Co. v. Lewis, 233 U. S. 389 at p. 413;
Munn v. Illinois, 94 U. S. 113;
Griffith v. Connecticut, 218 U. S. 563;
Dillingham v. McLaughlin, 264 U. S. 370.

6. The decisions of the courts have uniformly held that the differential between what a seller may choose to sell goods for cash and what the same seller may choose to sell the same goods for on credit is not interest nor within the prohibition of the usury laws, but no court has held, so far as appellants know, either in these decisions or in any construction of the due process clause of the Fourteenth Amendment, that the usury laws are the uppermost limits to which a state may go in advancing the general prosperity and welfare of its citizens through control of the cost of credit. Neither the novelty of the method of regulation made necessary to meet new situations, nor the absence of precedent will influence the court in determining whether a law lacks due process.

Munn v. Illinois, 94 U. S. 113;
Nebbia v. People etc., 291 U. S. 502 at p. 536.

7. The rights of property and liberty guaranteed to the appellee by the due process clause of the Fourteenth Amendment are not absolute, but are subject to the right of the public to limit them in the common interest.

Nebbia v. People etc., 291 U. S. 502 at p. 523;
Munn v. Illinois, 94 U. S. 113;

Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U. S. 151 at p. 157;
Advance-Rumely Co. v. Jackson, 287 U. S. 283.

8. The record wholly fails to show that the Act under consideration deprives appellee of its property or liberty without due process of law, and the court in the decision of a constitutional question will not enter into the field of speculative effects upon persons other than parties to the action.

Engle v. O'Malley, 219 U. S. 128;
Blair v. U. S., 250 U. S. 273 at p. 279.

9. The provisions of the Act are reasonably suited to effect its purpose and are not unreasonable, arbitrary or capricious. That being true, the policy of the legislation is for the legislature and not for the court. Having arrived at the conclusion that the state in the exercise of its police power has the right to fix maximum charges for credit extension in the cases applicable to appellee, the necessity of enforcing the limitations imposed is apparent. If the state cannot make legislative provision adapted to enforce such a right then the right itself is impotent. Sections 9, 10, 11 and 15(d) are not only adapted to the purpose of carrying out the finance charge provisions of the Act, but are absolutely essential thereto. They are, therefore, valid upon the principle that the purpose being proper such acts as are reasonably necessary to carry it out are likewise proper and within the scope of the state's exercise of the police power.

Nebbia v. People etc., 291 U. S. 502 at p. 537;
Mutual Loan Co. v. Martell, 222 U. S. 225;
Advance-Rumely Co. v. Jackson, 287 U. S. 283.

10. The very essence of the business regulated is discount and the very essence of the plan of regulation is the control of

the discount. Section 11 which requires appellee to have a license, section 18 which requires annual reports from licensees, and sections 19 and 20, which invest the department with authority to examine the business of licensees to discover violations and obtain information with which to fix charges under the Act and to assess and collect the cost of examination are a part of a definite and articulate plan of regulation bearing a reasonable relation to the prevention of extortionate and hidden charges in retail installment contracts in which a finance company may become interested.

Griffith v. Connecticut, 218 U. S. 563;
Mutual Loan Co. v. Martell, 222 U. S. 225;
Nebbia v. People, etc., 291 U. S. 502.

11. It is not a valid objection that the Act attacked deprives the appellee of due process of law in violation of the Fourteenth Amendment because it violates Section 1 of Article 4 of the State Constitution. Moreover, appellee is not in position to raise the question. However, the Act does not violate said provision of the Indiana Constitution.

Blue v. Beach, 155 Ind. 121;
State, ex rel., v. Beil, 157 Ind. 25 at p. 29;
Isenhour v. State, 157 Ind. 517;
Wallace v. Feehan, 206 Ind. 522 at p. 532.

ARGUMENT.

1. The findings of fact show that the business regulated by Chapter 231 of the Acts of the 79th Regular Session of the General Assembly of Indiana is a proper subject of regulation by the State in the exercise of its police power.

The business regulated is that of extending credit to retail buyers in installment sales of merchandise. In order to effect the regulation the Act prescribes the form of contract which must be used by the retail buyer and seller; authorizes the fixing of maximum finance charges, maximum delinquency charges and minimum discounts; requires the parties to exhibit the agreed price of the merchandise in the contract; provides for the licensing and regulation of finance companies and restricts the right of the retail seller to sell and the right of the finance company to buy retail installment contracts in order that the maximum charges and minimum discount may be made effective.

Appellee, General Motors Acceptance Corporation of Indiana, Inc. challenged the Act as applied to it. Findings 1 to 14 inclusive describe how appellee conducts its business, and particularly the business of purchasing retail installment sales contracts. In the findings General Motors Acceptance Corporation of Indiana, Inc., was referred to as GMAC and for convenience will be so referred to herein. GMAC is a corporation organized under Indiana laws to buy and deal in contract obligations and similar choses in action. The principal office and place of business are in the City of Indianapolis, State of Indiana.

GMAC's business is exclusively with retail sellers appointed by General Motors Corporation for the retail sales of the products manufactured by the latter. GMAC does business with approximately five hundred of such retail sellers. The products sold at retail by the sellers include automobiles, electric refrigerators, electric heating equipment or appliances such as vacuum cleaners.

GMAC's business consists of purchasing from the sellers installment contracts covering the retail sale and purchase of automobiles and the products above mentioned. Most of the installment sales contracts purchased by GMAC are contracts where the cash price is less than $1500 and the contract provides for retention of a security interest in the goods sold. The contracts are purchased from the sellers after the goods have been sold and the contract executed.

No retail seller is required to sell his contracts or fix the price of merchandise sold by him with reference to any material furnished by GMAC, R. p. 47, unless he expects to sell the contract arising from the retail sale to GMAC. R. p. 53. In the latter event he will probably follow the GMAC plan. The practice of all retail sellers who sell automobiles by means of retail installment contracts is to compute the price of the merchandise according to the memoranda provided by finance companies with which the retail sellers do business. R. p. 54.

The GMAC retail plan is the name given by the corporation to describe the business of purchasing retail installment contracts from retail sellers covering sales to customers, in which the terms, time prices and credit standing of the customer are satisfactory to GMAC. Under this plan both new and used car installment contracts are purchased.

The GMAC retail plan not only includes the terms and conditions, restrictions and limitations under which the retail installment contracts are purchased from sellers, and the relative rights of the parties in the transaction, but also suggests the salesmanship procedure to be used in negotiating installment sales, the manner in which the sales should be closed, the use of the payment charts, the investigation of the customer's credit statement, and the manner in which the contract arising out of the retail installment sale may be sold to GMAC. R. pp. 48, 49.

In furtherance of its retail plan and in anticipation of purchasing contracts from sellers, GMAC supplies sellers with the form of the retail contract of conditional sale, work sheets which are designed so that the retail seller will include in his time price a sufficient discount, R. pp. 50, 51, payment charts, R. p. 53, and other memoranda. This memoranda is furnished free of charge to the sellers. Under the GMAC plan retail sellers are required to conduct their business on a basic price for a cash sale, and the price is fixed either by the manufacturer or by the retail seller's desire for profit as modified by the factors of competition. To determine the price in an installment sale under the GMAC retail plan, the retail seller is first required to ascertain the amount the buyer can pay in cash. This amount is deducted from the seller's basic price, however determined, thus leaving an "unpaid balance." The next step in the plan is to find out the number of months the buyer will want for payment. With the amount remaining to be paid (unpaid balance) thus fixed, and the time for payment known, the retail seller applies the rate chart furnished by GMAC and is informed what amount must be added to the unpaid balance in order for it to sell the contract to GMAC and realize therefrom an amount equal to the unpaid balance. The amount shown on the rate chart to be

added to the unpaid balance, under the GMAC plan, is known as the "time price differential." The price of the automobile or other merchandise may then be fixed by the retail seller as the sum of the down payment, the unpaid balance and time price differential, and the form of contract provided by GMAC may then be executed. For the purpose of filling out this contract the dealer's work sheet, R. pp. 52A, 52B, is referred to and the computations taken therefrom. (R. p. 53.)

The contract calls only for the payment of a lump sum designated as "a total time price." It does not disclose any amount charged for insurance or for cost of financing. All retail sellers in Indiana, whether selling automobiles or other merchandise, and whether using the GMAC plan or the plan of some other finance company, use substantially similar contracts and compute their prices in installment sales in substantially the same way. (R. p. 54.)

Findings 20 and 21, and 25 to 37 inclusive, recount the facts and matters which persuaded the General Assembly of Indiana that legislation fixing maximum finance charges, maximum delinquency charges and minimum discounts in installment sales and making those charges and discounts effective was necessary to the public welfare of the citizens of Indiana.

At the time of the legislation not less than 140 finance companies were doing business in Indiana. All of them were engaged in buying retail installment contracts and the plan of each was similar to that of GMAC. Every retail seller who sold goods of any sort on the installment plan was a potential source of business to the finance companies. So far as the record goes, no retail seller was under obligation to sell his retail installment contracts to any particular finance company. The fact is unmis-

takable that every seller had many finance companies competing for the privilege of purchasing the retail installment contracts arising from his installment sales. GMAC did business only with retail sellers who sold manufactured products of General Motors Corporation, but most of the 140 finance companies refrained from purchasing contracts only when the terms were not satisfactory to them. R. pp. 56, 57.

Every finance company furnished retail sellers with data essentially identical with that which GMAC furnished to retail sellers of General Motors Corporation, although many of the companies had different rate charts for the same car, whether new or used. The forms of contract provided by these companies were essentially identical with that furnished by GMAC. R. pp. 57-59.

All of the companies did business on a discount basis when buying installment contracts. This simply meant that they paid the retail seller something less than the face amount of the contract. The amount of the discount was fixed by each company in its rate charts and was variously called "time price differential" or "finance charge." The retail seller knew that ordinarily he would be paid an amount for his contract equal to the difference between its face amount and the discount provided in the rate charts.

Extortionate Charges. The variation in amount of discount for twenty companies in Indiana on the identical unpaid balance of $300 on the purchase of a new automobile on installments for one year ranged from $28 to $60. In terms of interest, based upon the diminishing unpaid balance, these discounts range from 18.7% to 44.4% per annum. On used automobiles for the same unpaid balance for the same period of time, the

amount of discount ranged from $35 to $85.20. The latter discounts, computed in terms of interest upon the diminishing unpaid balance, range from 23.9% to 69% per annum. The amount of the discount on furniture was generally higher. On radios the discount was higher than either furniture or automobiles. On automobile tires the discount expressed in terms of interest and computed on the diminishing unpaid balance, ranged from 33.6% to 106.1% per annum. (R. pp. 63, 64.)

Installment sales of radios, electric goods and refrigerators amount to approximately 6½% of all retail installment sales in Indiana and installment sales of furniture amount to approximately 13% of the total. The ratio of automobile installment sales to all such sales is more than 60%. The amount of automobile tire installment sales is negligible.

The amount of the discounts which various companies fix in their rate charts represent the factors of cost, expense, loss hazard, capital investment, depreciation, insurance for the retail buyer and profit. The evidence does not disclose the proportion of these elements for any company.

The Department of Financial Institutions which is charged with the enforcement of the challenged Act made an investigation of consumer credit agencies, including finance companies, and recommended legislation requiring that the cost of credit extension in installment sales be separated from the cost of insurance and that the former be expressed in terms of a rate per cent per month based upon the diminishing unpaid balance of the price of the merchandise. This was recommended so that the purchaser would have a basis on which to compare cost of credit in installment sales with cost of credit from direct lending agencies. (R. p. 68.)

The finance companies had always done business on a discount basis as described above and it may be that the legislature deemed the provisions for maximum charges and minimum discounts in connection with the provisions requiring the parties to exhibit the agreed price of the merchandise, the down payment, the insurance cost and finance charge would provide a comparative cost basis.

Reserves, Bonus, Rebate and Pack. "Reserves" usually refer to an amount paid the seller out of the discount on a contract. (R. p. 66.) The reserve is contracted for between the seller and the finance company, either by general agreement, if he sells most of his contracts to a particular finance company, or by special agreement when each contract is sold. The theory of the reserve is that the dealer should be compensated for the loss hazard he is under. (R. p. 66.)

The GMAC plan includes a reserve in the discount for the loss hazard incurred by GMAC, as well as for the dealer. (R. p. 60.) The amount of the reserve which GMAC agrees to set aside for the retail seller is so fixed as to be sufficient, in the case of the average seller of manufactured products of General Motors Corporation, to cover all losses and provide an additional margin over losses in excess of the actual loss experience. (R. p. 56.)

Under the GMAC plan, the dealer is liable on a limited recourse agreement. The amount of reserve is credited to the dealer in a reserve account maintained by GMAC in the dealer's favor and is paid to the dealer from time to time as an amount is accumulated in the account. (R. p. 56.)

"Bonus" also refers to an amount paid the seller out of the

discount on a contract. Sometimes it is referred to as "Dealer's Bonus" or "Dealer Participation." The names eloquently describe the character of the item. The finance companies purchase the paper without any recourse whatsoever on the seller, but the companies pay the seller a part of its discount. The bonus is part of the arrangement when the paper is bought. It may be paid in cash by paying the seller more than his unpaid balance, or it may not be paid until collected from the buyer. GMAC does not pay a bonus. R. p. 61.

Some of the finance companies doing business in Indiana pay "rebates" to retail sellers that sell their contracts to that finance company. The rebate is a certain amount in cash paid to the retail seller on each contract which the particular finance company accepts. It is distinguished from the reserve and bonus in that it is paid without reference to the discount or collection of the contract and goes to the retail seller without any restrictions whatsoever. The evidence does not disclose amounts paid as rebates. R. p. 66.

The "pack" exists only in the case of installment sales of automobiles. The practice is for the seller to add to the discount shown in the rate chart an additional amount known as "pack." The retail buyer is not informed that the item is not part of the discount required by a finance company, but on the contrary may be led to believe that the whole amount added to the unpaid balance, the sum total of the pack and the discount, is retained by the finance company. In practice, the finance company collects, but does not retain the pack. The dealer collects the amount from the finance company at the time he sells the contract or, in some instances, after the contract has been fully paid the amount is credited to the reserve account of the dealer with the finance company. The common range of packs is from

$10 to $25, although in some instances, it may reach $40 or more. R. p. 67.

It is significant that all of the charges, whether cost of financing, insurance, reserve, bonus, rebate or pack, have the common characteristics of being included in the discount added to the basic price by the retail seller and being unknown, as to amount, to the retail buyer. However legitimate the charges for insurance, cost of financing and reserve may be the inseparability of the items as they appear in a single unit makes it impossible for the retail buyer to know whether he is paying more for insurance and more for financing than he would have to pay from other available sources of credit. The character of the items of rebate, bonus and pack is such that the buyer not only has no means of knowing the amount of each of them, but probably does not suspect that they exist. Furthermore, neither of the parties on the other side of the bargain can inform him that the items do exist or what is the amount of them. The finance company, in order to avoid any implication of usury, maintains a cool aloofness in regard to the transaction between the retail seller and retail buyer, however genuine in fact its affection for the retail seller may be. The retail seller, in order that his "selling policies" may not be compared with competitors, acknowledges no intimacy with the finance company that will purchase the buyer's contract.

In the final analysis the selling policy referred to in finding No. 29 must mean only that the retail seller, through the medium of the discount facilities provided by the finance company has an unfair weapon in negotiations between the seller and the buyer to establish the basic price on which the discount will be predicated. If the seller fixes a low price for the merchandise and adds the difference in the discount, whether an additional

amount for rebate or pack is added or not, whatever equality of bargaining power theretofore existed between the seller and buyer has been robbed of its efficacy. R. p. 69.

Whether the citizens of Indiana are unusually sensitive to the refinements of business negotiations is not shown by the record. That they are only average in their discernment may be assumed. It is not difficult to see that the only element restraining the seller and finance company from relieving the buyer of his bargaining power within the variable limits offered by the buyers credit and the security value of the goods is the extent to which the seller and the finance company will cooperate with one another.

Other elements of the business of installment selling. The forms of contract supplied to retail sellers by finance companies generally contain no provision for a return of any part of the "finance charge" or "time price differential" if the buyer prepays the contract. As opposed to the lack of prepayment provision every contract provides for interest on overdue installments to the extent permitted by the laws of the State, and in Indiana the extent is 8% per annum.

The report of The Department of Financial Institutions did not deal with delinquency charges as such or prepayment provisions, as they are provided for in this Act, because its recommendation that the finance charge be stated as a rate per cent per month on the unpaid diminishing balance automatically took care of both items. R. p. 68.

In addition to delinquency charges some finance companies require a reinstatement fee, collect amounts on account of letters sent or acts done in connection with the collection of delinquent installments, and charge transfer fees when a condi-

tional vendee sells his equity to another person and the latter desires to continue payment in accordance with the provisions of the conditional vendee's contract. Methods of enforcement of these fees which are not ordinarily provided for in the contract evidencing the sale vary, but are sometimes enforced by refusal to deliver the certificate of title held by the finance company in pursuance of the retention of title in the original conditional sale contract. R. p. 68.

The foregoing facts read in connection with the provisions of the challenged Act reflect the purpose of the legislation with such clarity that denial is impossible. It is not conceivable that the members of the General Assembly of Indiana were unaware of the facts disclosed in this regard. The report of The Department of Financial Institutions was before them and many of the abuses were set out and a remedy suggested. Even without the report it cannot be assumed that the General Assembly was without independent knowledge of the circumstances surrounding the extension of credit in retail installment sales in Indiana. No declaration of purpose is contained in the Act, but every provision is pointedly directed to correction of an abuse disclosed by the record. The validity of the purpose of this legislation has been recognized by the courts throughout the range of the common law. Even for merchandise, an unreasonable price is not permitted where the parties have not agreed. If they have agreed, the price will not stand in the face of fraud. The concern of this Act is a reasonable price for credit and what may be represented as credit fixed by the parties within the maximum limits prescribed by the State and under conditions reasonably free from the possibility of unfair practice.

2. It is not the purpose of the Act to fix the price of any

goods sold by a retail seller nor can the Act be so construed as to exhibit such an intention of the legislature.

There is no provision in the Act under consideration which purports to fix or to authorize the Department to fix the price of any merchandise which may become the subject matter of a retail installment sale. The Act only provides that the price agreed upon by the parties for the merchandise be set out in the written instrument required by Sections 2 and 4. In most instances the written instrument will be a conditional sales contract. Whatever price is finally agreed upon by the parties must be set out in the conditional sales contract and is the "cash price" as that term is defined in the Act.

In the court below appellee insisted that the effect of the Act is to fix the terms and prices and the manner in which retail sellers might sell and conduct their sales of automobiles at time prices payable in installments. It was asserted that the parties to a contract of sale which is finally made as an installment sale never agree upon a cash price, and that, therefore, no cash price can be stated nor can the parties be required to agree upon a cash price. It is obvious that the contention was based on the premise that the term "cash price" as used in the statute means the price a seller would have sold his goods for had the sale been one for cash on delivery. It is equally obvious that the term "cash price" was not defined in this way. The language of the statute is sufficiently clear to resolve any doubts on the matter. It says that "cash price" means the price the parties agree upon for the goods. This neither means that the parties are required to agree upon a price which would have been satisfactory to each of them had the sale been for cash on delivery, nor does it mean that the parties must agree upon a price in rela-

tion to any other terms of the bargain which might be considered by them. Prior to the challenged Act appellee had characterized the price fixed by the agreement of the parties as the time price. Now the statute requires it to characterize the price so fixed as the "cash price." The statute does no more than this by its definition. The right of the seller to name the price at which he chooses to sell is not put in issue by this definition. That right is most carefully preserved.

This court will presume that the legislature was acquainted with its decision in Hogg v. Ruffner, 66 U. S. 115, and with the decision of the Supreme Court of Indiana in Newkirk v. Burson, 28 Ind. 435. Both courts held that a vendor could sell merchandise at a higher price on credit than he had fixed for the same merchandise when payment was to be cash and not violate the usury laws. It is reasonable to assume that the legislature was acquainted with the administrative difficulties which would have been encountered by the courts had a different result been reached in either case. The courts had and now have no adequate means for ascertaining what price a vendor would have sold goods for cash when he has, in fact, sold them on credit and hardly more adequate means of ascertaining when a vendor has raised his price for the sole purpose and with the intent of taking excessive interest.

Whether the courts bottomed the decisions in the cases mentioned on the administrative difficulties involved or whether they preferred to rest on the principal that a man may set his own price, whether for cash or for credit, it must be assumed that the legislature was acquainted with the results of the cases. It would have availed the legislature nothing in its effort to protect the welfare of the citizens of Indiana in the situations presented by

the facts to require sellers to fix a price for goods involved in a credit transaction upon the basis that the goods were to be sold in a cash transaction and thereafter add the amount to be charged for any credit extended. Such a requirement would have been so indefinite as to be incapable of determination thereby inviting disapproval on the ground of administrative difficulties alone. More serious, it would have put the right of the seller to name his price in issue.

On the other hand, the legislature knew that it could require the parties to a contract for the sale of merchandise to make it in writing and could require the parties thereto to state the price they had agreed upon. It was equally clear that no insuperable administrative difficulties were involved for the courts when questions were presented concerning the price which the parties had agreed upon. Furthermore, the price agreed upon could be a bona fide credit price or "time price," as appellee is pleased to call it, fixed without reference to the price that would have been charged had the sale been for cash. It will be presumed that it was with knowledge of the foregoing situation that the legislature defined the term "cash price" as it is used in the Act under consideration.

On the meaning of the term "cash price" as we construe it, the net effect of the contention of the appellee may now be stated. It is that the provisions of the Act which require every retail seller to execute a written contract to evidence the sale and to show the price that parties have agreed upon for the merchandise are provisions fixing the price of the merchandise. Clearly, the price fixing objected to is not price fixing by statute. If the term price fixing is applicable at all, the grievance of appellee is that it is price fixing by contract.

In connection with the problem of usury as it has been dealt with by the courts when presented in cases involving sales we commend to the court's attention an article by Raoul Berger entitled "Usury in Installment Sales" in Volume II, Law and Contemporary Problems, pages 148-172.

3. The foregoing construction of the provisions of the Act which require the parties to a retail installment contract to put the agreed price in the written contract made to evidence the sale operates as a complete avoidance of any pitfalls that may be involved in the case of an attempt to fix the price of merchandise generally. Furthermore, it is a complete answer to any contention that the right of the seller to name the price at which he may choose to sell his goods is put in jeopardy.

If objection be made to our construction of the provisions of the Act under discussion that objection is fully met by the principle that this court, in the construction of a statute will, if possible, give it that construction which is in harmony with constitutional limitations. Panama R. Co. v. Johnson, 264 U. S. 375; Crowell v. Benson, 285 U. S. 22. In the latter case, an award made under the Congressional Longshoremen's and Harbor Workers' Compensation Act was attacked on the ground that the administrative authority conferred violated the due process clause of the Fifth amendment. To the particular objection that the findings of an administrative officer were made final and not reviewable by the courts, this court replied that the statute should not be so construed because a constitutional construction was permissible. At page 62, the court said:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court

will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final."

4. The judgment of the General Assembly of Indiana that regulation of the business of installment selling was necessary to the prosperity and well being of its citizens is vindicated by the circumstances. The usury laws were inadequate and the state of economic development made it imperative that consumer credit be maintained on a fair basis to the consumer.

It is a matter of common knowledge that all citizens require means of obtaining money, property or service upon credit. The record is sufficient evidence of the fact in that 60% of all automobiles are sold on the installment plan. Like other products now in common use in the routine process of living the automobile has progressed from the state of a mere personal pleasure to an instrument, in many instances, of prime necessity. Suburban cities have come. Factories have removed from congested city limits with no fear for a limited labor supply. The automobile has become an integral part of the nation's transportation system.

The record demonstrates the cash means of the major portion of the families of Indiana and the imperative requirement for credit, if those families are to possess goods of a retail price of $1500 or less. There is no pretense that this Act was de-

signed to protect only small wage earners or necessitous persons whose resources frequently must be combined in order to borrow $300. On the other hand, it is not to be denied that persons of this class are the potential buying strength on which the used car, used radio and used furniture markets depend. However, persons will benefit from the protection afforded by this Act, even though they have sufficient cash means to make a down payment in an installment sale equal to $500. The beneficiaries of the intervention are those who, in the course of obtaining economic necessities and conveniences, as well as pleasures, may pledge their earnings to the payment of a debt created under a business arrangement developed to permit the extension of credit without customary limitations and devoid of the opportunity for scrutiny and comparison.

It has always been a favorite method of defeating usury laws to clothe the transaction in the form of a sale. Mutual Loan Company v. Martell, 222 U. S. 225. States have imposed limitations upon sales of wages by restricting rights of assignment and by declaring the differential between the sale price and the amount of the wage to be interest.

The facts found in the court below and summarized under Point 1 of this argument show the circumstances which moved the General Assembly to pass the challenged Act. Apart from the findings which particularly outline the manner in which retail sellers conduct sales of automobiles, the substance is that abuses exist in the business regulated and that the abuses arise out of and depend upon the sale of credit through a third party. The same abuses apparently exist in other States. They have been the subject of investigation in Wisconsin, (See Report of the State Banking Commission and Interim Advisory Legisla-

tive Committee to Investigate Finance Companies, 1935) and Massachusetts (See Report of the Special Commission Established to Investigate the Advisability of Providing for the Licensing and Regulation of the Business of Financing Purchases of Certain Personal Property, January, 1936). The device has proven so attractive that its forms have been resorted to by some banks for some loans. (See The Wall Street Journal, February 21, 1936, page 5, column 1.)

It was evident to the legislature that usury laws were inadequate to cope with the factual situation presented to it and that its power must be exercised if the evils of installment selling were to be overcome for the citizens of Indiana.

5. While not the only remedial feature of the Act, it is nevertheless true that the provisions authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment as provided in sections 6 and 26 are of its very essence. It is quite important, therefore, that this right be sustained if the major purpose of the legislation is to be accomplished.

We have predicated our proposition that the provisions of the Act under consideration authorizing the fixing of maximum finance charges, maximum delinquency charges and minimum discounts on prepayment are valid on the premise that it is done in the exercise of a proper legislative purpose which is the promotion of the general welfare of the people of Indiana. Based upon that premise, the only requirement is that the means employed to accomplish the purpose be reasonable and have a substantial relation to the object sought to be attained. As said by the court in Nebbia v. People etc., 291 U. S. 502 at page 525:

> "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

The above provisions clearly meet this requirement. What other method more adapted to the correction of the evils found to exist in the financing through finance companies of retail installment selling could be devised than to apply the regulation to the thing in which the evil to be corrected inheres. The method employed by this Act is not only adapted to the accomplishment of the purpose of the Act but, leaving out mere details which, of course, may vary, is probably the only method which is adequate and complete. The restriction of sales of such contracts to licensees, which provision will doubtless be attacked, is obviously necessary to carry out the general purpose of the Act to limit finance charges since otherwise the corrective features of the Act would be violated with impunity.

6. Certain it is that the ordinary usury statutes are not adapted to carry out the purpose of the legislature as evidenced by said Act. The appellee in the past has manifested a spirit of smug complacency in the security found in the authorities dealing with usury statutes and retail installment sales. But these authorities prove too much and what they do not prove is as significant as what they *do* prove. First, they prove too much. They prove, if they prove anything at all, that the usury laws are impotent to cope with the evils both actual and inherently possible in modern financing of retail installment selling. Second, they *do not* prove that the usury statutes are the only available cure for such evils.

As early as Munn v. Illinois, 94 U. S. 113 at p. 133, it was said:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress."

And later, in Nebbia v. People etc., 291 U. S. 502 at page 536, after referring to numerous decisions where regulations affecting businesses of varying character were upheld, the court said:

> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

It is very true that under the authorities, the differential between what a seller may choose to sell goods for at cash and what he may choose to sell the same goods for on credit is not interest, but it does not, for that reason, follow that such charges involved in modern financing of retail installment selling,—a subject which in recent years has been under the scrutiny of at

least three legislative investigating committees and of numerous others of a more or less private character,—it does not follow that such charges, in which the public generally is so manifestly interested, may not become the subject of regulation and limitation. Modern methods of financing retail installment selling present an entirely new situation requiring an entirely new treatment in the interest of the general welfare. That is what the Act under consideration accomplishes, we insist, within constitutional limitations.

7. Nothing is better settled than that the rights of property and liberty guaranteed by the Fourteenth Amendment are not absolute but are subject to the right of the public to limit them in the common interest. The numerous decisions cited in the opinion of the court in Nebbia v. People, etc. *supra* attest the wide variety of cases to which the principle above announced applies. It applies to interest charges; (Griffith v. Connecticut, 218 U. S. 563) it applies to storage charges in public warehouses; (Brass v. North Dakota, 153 U. S. 391) it applies to fire insurance premiums; (German Alliance Insurance Co. v. Lewis, 233 U. S. 389) it applies to insurance agents' compensation; (O'Gorman & Young v. Hartford Ins. Co., 282 U. S. 251) it applies to attorney's fees in certain cases; (Frisbie v. United States, 157 U. S. 160) it applies to banking and kindred types of business; (Dillingham v. McLaughlin, 264 U. S. 370) and to many others. For other cases see the case of Nebbia v. People etc., 291 U. S. 502. Why may not the principle with equal propriety apply to finance companies engaged in the business of financing retail installment selling, if the legislature determines upon a policy of their regulation? Is it because the finance charge is not interest? Is it because it disturbs the nomenclature of "time-price"? Neither, we submit, is sufficient to deprive the state

of the right to meet the new conditions with new measures designed to advance the general welfare, and that is all this Act does. It accepts the rulings of the past; but it does not stop there. It meets the conditions of the present system with the appropriate measure to safeguard the public.

8. Sections 9, 10 and 15(d) of the Act are of the utmost importance in the consideration of the method of regulation provided by it. We will consider them somewhat analytically in our discussion of subdivision 9 of the *Summary of Argument*. Before doing so, however, we desire to state our view of the limitations of the inquiry under the present circumstances. We think it is well settled that such constitutional questions as the court will consider are those only which affect the *appellee's* rights. The court, in the determination of the question of the constitutionality of a law, will not enter into the field of speculative effects and especially where the parties to the action are not shown by the record to be affected.

Engle v. O'Malley, 219 U. S. 128;
Blair v. U. S., 250 U. S. 273 at p. 279.

9. A consideration of sections 9, 10, 11 and 15(d) of the Act are now in order. We think we are justified in saying that finance companies, foreseeing that some sort of regulation of their business is inevitable, have sought to avoid any effort to fix maximum finance charges, and one of their common arguments, other than the constitutional objection, has been the argument that such a regulation can not be enforced. Sections 9, 10, 11 and 15(d) are designed to meet that argument, and hence are attacked with all the force that can be brought to bear. Briefly stated, section 9 prevents retail sellers from selling, assigning or transferring retail installment contracts to any person other than a licensee

under the Act. This, of course, is not a limitation upon the licensed finance company but it is a limitation upon the right of the retail seller to sell his retail installment contract. We take it that the question here, as always in such cases, is: Is the limitation a reasonable one to accomplish a valid legislative purpose? We have already discussed the question as to whether the legislative purpose is a valid one and for that reason will not again discuss it here, assuming for the purpose of this argument, that such legislative purpose is valid. Upon that basis we think the limitation provided by section 9 is not only reasonable but wholly justified. In arriving at that conclusion the transaction regulated is necessarily considered as an entirety as constituting a particular method of doing business rather than separately as to its several steps. The combined relationships between the retail seller, the retail buyer and the finance company constitute a method of doing business peculiar to itself. There is involved in it the sale of merchandise, the sale of contracts, the furnishing of capital and the extension of credit. And while there is nothing in the transaction that in a strict sense can be called the loan of money, the net result or effect of it is the loan of money. There is nothing in the Act which limits the retail seller, except as to the form of the contract, if he chooses to finance his business himself. But when he chooses to use the finance company in this new device for the extension of credit he must use it within the limitations provided by the Act. The Constitution does not guarantee to the retail seller the unrestricted right to conduct his business as he pleases, Nebbia v. People etc. *supra,* and if the legislature finds in the combined methods of the retail seller and the finance company a condition detrimental to the general welfare, there is no constitutional provision which prevents a limitation reasonably

suited to remedy the evil. Mutual Loan Co. v. Martell, 222 U. S. 225. The provision of section 9 is such a limitation. There would clearly be no efficacy in providing for the licensing of finance companies if retail sellers could, with impunity, sell to an unlicensed company; and without the licensing provision of section 11, enforcement would be impossible.

Section 10 provides, among other things, that any licensee may purchase any retail installment contract on such terms and conditions not inconsistent with the provisions of the Act and at such price and upon such terms as to the payment of the price as may be agreed upon between the licensee and the retail seller. The portion, however, to which objection is made is the portion which provides that:

> "No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or

under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed."

It is recognized that there is a certain loss hazard in retail installment selling and that the item designated "reserve" as a part of the finance charge is a legitimate item when limited to the reasonable requirements to meet such hazard. On the other hand, it is believed to be clear that the retail seller should realize his profit from the merchandising transaction *only*, and that the finance company should receive all profits derived from the financing transaction. In the past these reserves included in the finance charge depending upon the method of operation have usually been sufficiently large to enable the finance company to return a part of it to the retail seller in some form of "dealer participation," which has been used as a bargaining item of the finance company for the dealer's business, *at the expense of the retail buyer*. As we have said, a "reserve" for losses is a legitimate item to be taken into consideration in fixing a finance charge whether fixed by the unregulated finance company or by some public agency authorized to fix it; but when it becomes too large as fixed by the unregulated finance company it becomes one of the abuses to correct which the Act under consideration was passed. It was necessary, therefore, to authorize the Department to fix maximum loss reserves which might be allowed in the final analysis to the finance company or to the retail seller according to their respective interests.

The objection that this item must be fixed without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse or without recourse is with-

out any merit since the amount to be fixed is a maximum sufficient to meet any type of contract between the retail seller and the licensee, leaving the reserve to be divided between the retail seller and the finance company according to their agreement based upon their respective liabilities.

Section 15(d) deals with the grounds for revocation of licenses of licensees. It provides as follows:

> "The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:
>
> * * *
>
> (d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination or understanding (,) expressed or implied (,) with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.
>
> The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee (license) may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operat-

ed by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made."

It seems to us that this provision and section 11 are not objectionable and are reasonably necessary to carry out the purpose of the Act. It does not forbid the purchasing by licensees of retail installment contracts at a less price than the unpaid balance. It is only where the licensee has wilfully avoided or attempted to avoid the provisions of the Act by so doing that this is a ground for revocation of a license. The provision is not designed to restrict or limit the right of contract between the retail seller and the finance company as expressly provided in section 10 of the Act, and to which reference has already been made, but where the device of buying at a less price than the unpaid balance is used to violate the provisions of the Act and the regulations of the Department of Financial Institutions fixing maximum finance charges which may be contracted for, it then becomes a ground for revocation of license. In other words, the device of buying for less than the unpaid balance can not lawfully be used as a means of increasing the maximum finance charge *which the retail buyer must pay* and in whose interest the fixing of a maximum finance charge is made, and when the Department finds that has been done, it may, after a hearing, revoke or suspend the license of the offending licensee. But except for that, the Department has no interest so far as the above provision is concerned in the contract between the *retail seller* and the licensee. The limitation, therefore, is not unreasonable and is simply for the purpose of preventing the

charging against the retail buyer by indirection of a finance charge which could not be charged against him directly.

IN CONCLUSION.

In the absence of a written opinion by the lower court showing specifically the provisions of the Act upon which the decision is based, we have had some difficulty in determining the exact scope of the inquiry. We have, however, sought to discuss those provisions which might conceivably bear upon the question of due process, the ground stated in the conclusions of law as the basis for the decree. Any summary of the discussion would be of little value unless the same be somewhat extended, and an extended summary would necessarily be a restatement of much that has already been stated. For that reason we will not attempt a summary, contenting ourselves with a simple outline.

First. The facts abundantly show that retail installment selling and the extension of credit involved therein through the instrumentality of selling retail installment contracts to finance companies is a proper subject of regulation under the police power of the State.

Second. The challenged Act in recognition of the futility of any attempt to shape usury statutes so as to effectually regulate such business, adopted the plan of providing for the fixing of maximum finance charges, which bears a similar relation to the established method of financing retail installment sales as interest bears to the forebearance of money, upon such a basis as would protect the retail installment buyer from unreasonable prices for credit in addition to providing for a disclosure of such charges and their several items and upon such a basis as

would insure sufficient capital for the purpose of supplying such credit.

Third. The method adopted by the General Assembly of Indiana is reasonably adapted to the purpose of the Act and is not arbitrary or capricious.

Fourth. The classifications made by the Act are reasonable and not subject to constitutional objection.

Fifth. The limits of and basis for the exercise of power by the Department of Financial Institutions is sufficiently definite to meet any constitutional objections and its actions are expressly made subject to judicial review.

Sixth. The Act challenged does not violate the Fourteenth Amendment.

For the foregoing reasons it is respectfully submitted that this cause should be reversed.

Respectfully submitted,

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APPENDIX "A".

CHAPTER 231.

(H. 377. Approved March 11, 1935.)

AN ACT to license and regulate and to promote competition in the business of purchasing contracts arising out of retail installment sales, to prescribe the form of such contracts, to empower the department of financial institutions to classify retail installment sales and contracts arising therefrom and to fix and prescribe maximum charges for the extension of credit in retail installment sales.

SECTION 1. Definition of Terms.—*Be it enacted by the general assembly of the State of Indiana,* That in this act, unless the context or subject matter otherwise requires:

The term "retail installment sale," or the plural thereof, means and includes every retail contract to sell specific goods and every retail sale of specific goods to any person:

(a) In which the cash price of the goods is not in excess of $1,500, and may be paid in installments over a period of time, and,

(b) In which the seller has taken or retained a security interest in the goods.

The term "person" includes a corporation or partnership or (of) two or more persons having a joint or common interest.

The term "goods" includes all chattels personal other than money, things in action, emblements, industrial growing crops, things so affixed to the land as to become a part thereof, or

things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

The term "specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

The term "retail" means to dispose of specific goods to, or to acquire specific goods by, a person who may consume such goods for his personal use.

The term "buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

The term "retail buyer" means a buyer who is a party to a retail installment sale, or any legal successor in interest of such person, and includes any person who as surety, indorser or guarantor or otherwise is liable on the obligation created by any retail buyer on any retail installment contract.

The term "seller" means a person who sells or agrees to sell goods.

The term "retail seller" means a seller who is a party to a retail installment sale.

The term "cash price" means the price, measured in dollars, agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail installment sale.

The term "retail installment contract" means any written instrument, lawful under this act, which is executed in connection with any retail installment sale and is required by section 2 hereof or is authorized by section 3 hereof, and the term may include all such instruments executed in connection with any retail installment sale.

The terms "contract to sell," "sale" and "conditional sale" shall have the same meaning in this act as they are respectively defined in the Uniform Sales Act and Uniform Conditional Sales Act.

The term "conditional sales contract" means any written instrument evidencing a conditional sale.

The term "bank or trust company" means any national banking association formed under the laws of the United States with its principal office located in this state and doing business herein and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company or trust company organized and doing business under the provisions of any law of this state.

The term "department" means "The Department of Financial Institutions."

The term "manufacturer" means a person who is engaged, directly or indirectly, in the manufacture or distribution of specific goods which may become the subject matter of a retail installment sale in this state.

The term "finance charge" means any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time.

The term "security interest" means a property interest in goods which are the subject matter of a retail installment sale, limited in extent to securing performance of some obligation of the retail buyer or of some third person to the retail seller and includes the interest of a mortgagee of the goods and the title

to the goods whether or not expressed to be absolute, whenever such title is, in substance, retained for security only.

SEC. 2. Written Instrument.—Every retail installment sale shall be evidenced by an instrument in writing signed by the retail buyer, and a copy thereof shall be delivered to him by the retail seller at the time of its execution. An acknowledgment of the delivery thereof contained in the body of the instrument shall be conclusive proof of delivery in any action to enforce any obligation arising out of the retail installment sale. The written instrument shall contain all of the agreements of the parties made with reference to the specific goods which are the subject matter of the retail installment sale, and shall set forth specifically all items and matters required by this act. The reference to insurance shall recite generally the type or types of insurance the retail seller has agreed to procure for the retail buyer but such reference to insurance shall not be construed to imply the scope of the coverage, the terms, exceptions, limitations, restrictions or conditions of the contract or contracts of insurance to be furnished. Nothing in this act shall be construed to require the retail seller to comply with the provisions hereof at any time prior to the delivery of the specific goods to the retail buyer.

SEC. 3. Retail Installment Contracts.—Any retail seller may require any retail buyer to execute and deliver a promissory note to evidence the indebtedness created by any retail installment sale, and, to secure the payment of the indebtedness created by the sale or evidenced by the promissory note or to secure the performance of any other condition of the sale, may require the retail buyer to execute and deliver a conditional sale contract, chattel mortgage or other instrument to give the retail

seller a security interest in the specific goods which were the subject matter of the retail installment sale. A written instrument required by section 2 hereof may evidence a conditional sale.

SEC. 4. Provisions of Written Instruments.—Every written instrument evidencing a retail installment sale shall recite the following separate items as such and in the following order:

(1) The cash price of the specific goods.

(2) The amount in cash of the retail buyer's down payment, whether made in money or goods or partly in money or partly in goods.

The term "down payment" for the purpose of this section, shall mean that part payment of the cash price required by the retail seller as a condition to the delivery of the specific goods sold or to be sold or to the extension of credit to the retail buyer for any portion of the cash price.

(3) The unpaid balance of the cash price payable by the retail buyer to the retail seller which is the difference between items (1) and (2).

(4) The cost to the retail buyer of any insurance the retail buyer has agreed to procure, if the retail seller has agreed to purchase the insurance and extend credit to the retail buyer for the price thereof.

(5) The principal balance owed on the retail installment contract which is the sum total of items (3) and (4).

(6) The amount of the finance charge.

(7) The time balance owed by the retail buyer to the retail seller and the number of installment payments required and

the amount and date of each payment necessary finally to pay the time balance which is the sum total of items (5) and (6).

Item (4) and item (6) may be added together and stated as one sum in the written instrument and if so stated item (5) may be omitted, but in such event the retail seller shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract a statement reciting the separate amounts of items (4) and (6).

SEC. 5. The Insurance.—Any retail seller who, in any retail installment contract has agreed to purchase insurance for the retail buyer and to extend credit for the price thereof, shall, within twenty-five days after the making of the retail installment contract, mail to the retail buyer at his address as shown on the retail installment contract, a policy or policies of insurance or in lieu thereof a certificate briefly describing the protection afforded by the insurance procured, and the kind and amount thereof. If the premium for insurance of like kind and amount, as fixed in the published manual of a recognized standard rating bureau designated by the retail seller, is less than the amount charged the retail buyer as fixed in the written instrument in compliance with item (4) of section 4 hereof, the retail buyer may deduct an amount equal to the difference from the amount of the last payment owed the retail seller. If, before the sale, assignment or transfer of the retail installment contract, the retail seller has not purchased the insurance for the retail buyer which the former, under the terms of the retail installment contract, is required to purchase, any licensee hereunder who becomes the owner, assignee or transferree of the retail installment contract shall, within twenty-five days after the execution of the

assignment, purchase the insurance and mail the policies or certificates, instead of the retail seller as required above, and may, subject to the provisions of this section, collect and receive the amount of the cost thereof which was included as a part of the principal balance on the retail installment contract.

SEC. 6. The Finance Charge and Prepayment.—Subject to the provisions of this act, any retail seller at the time of making any retail installment sale may contract for the payment of a finance charge by the retail buyer and collect and receive the same. The finance charge contracted for in any retail installment contract may not exceed the maximum finance charge then authorized by the department as in this act provided. Every retail buyer shall have the right, at any time, to pay the then unpaid time balance owed on any retail installment contract, whether then due or not, and upon payment thereof, any holder of the retail installment contract shall reduce the amount of the then unpaid time balance by the amount fixed and determined in accordance with the regulations of the department in force as of the date of the making of the particular retail installment contract and applicable to such cases. The reduction herein authorized may be known as a discount and every retail buyer, upon full prepayment of any unpaid time balance owed by him on any retail installment contract, shall receive the discount but only in the amount, at the times and upon the conditions provided herein. The department shall and is hereby authorized to fix and determine the amount of any discount to be given for prepayment as in this section authorized but no such discount shall be for an amount in excess of the amount of the finance charge on any particular retail installment contract.

Every retail seller may, at the time of making any retail

installment sale, contract for the payment by the retail buyer of lawful delinquent charges for failure to pay any installment of the time balance on the date specified in the retail installment contract, and any retail seller or any lawful holder of a retail installment contract in which delinquent charges are contracted for may collect and receive the charges lawfully contracted for.

SEC. 7. Limitation on Amount of Debt and Charges.—No retail installment contract authorized by section 3 of this act which is executed in connection with any retail installment sale shall evidence any indebtedness in excess of the time balance fixed, in the written instrument in compliance with item (7) of section 4 of this act, but it may evidence in addition, any agreements of the parties including agreements for the payment of delinquent charges, taxes and fees, including attorney's fees. No retail seller, directly or indirectly, shall contract for or receive from any retail buyer, as consideration for the extension of credit to the retail buyer for the amount of the principal balance, any further or other amount whatsoever for examination, service, brokerage, commission, expense, fee or other thing of value than the finance charge, charges and fees permitted by this act, taxes on account of any retail installment contract or on specific goods sold thereunder and any lawful fees actually paid out by the retail seller to any public officer for filing or recording or releasing any instrument securing the payment of the obligation owed on any retail installment contract. The lawful fees may be collected when the retail installment contract is made or at any time thereafter, but may not be included in the principal balance fixed in the written instrument in compliance with item (5) of section 4 hereof.

SEC. 8. Limitation on Recovery and Enforcement of Lien.—

No retail installment contract which evidences an indebtedness greater than allowed by section 7 hereof and no retail installment contract in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable against any retail buyer for any amount in excess of the principal balance thereof and no security interest created by any such retail installment contract in connection with which an indebtedness is evidenced which is greater than allowed by section 7 hereof or in connection with which any charge prohibited by this act has been contracted for or received shall be enforceable for an amount in excess of the principal balance against any retail buyer in default under the terms of the retail installment contract.

SEC. 9. Limitation on Assignment of Contracts.—Except as in this section otherwise provided, every retail installment contract shall be assignable and the interest therein transferable to any person or persons. No retail seller may sell, assign and transfer any retail installment contract to any person other than a licensee under this act. Any retail installment contract which is or has been owned by a licensee may be enforced and collected by the holder thereof according to its lawful terms.

SEC. 10. Purchase of Retail Installment Contracts.—Any licensee hereunder may purchase any retail installment contract on such terms and conditions not inconsistent with the provisions of this act, and at such price and upon such terms as to the payment of the price, as may be agreed upon between the licensee and the retail seller. The records of the licensee shall show the price actually paid for retail installment contracts separately assigned to such licensee but retail installment contracts may be assigned in group or in bulk to any licensee as may from

time to time be authorized by the department by regulation without disclosing the purchase price of the individual retail installment contracts. The department is authorized to make regulations from time to time concerning the purchase by licensees of retail installment contracts in group or in bulk and any purchase of such retail installment contracts made within the terms of the regulations shall not be construed as an attempt to avoid the operation and effect of this act.

No licensee shall enter into any agreement with any retail seller regarding the purchase of any retail installment contract whereby the retail seller shall receive, directly or indirectly, any benefit from or part of any amount collected or received from any retail buyer, as a finance charge or as the cost of the insurance to the retail buyer, in excess of an amount fixed and determined by the department and no licensee shall directly or indirectly pay any part of the amount collected as a finance charge or retail buyer's cost of insurance to any retail seller on any retail installment contract purchased from him in excess of the amount so fixed; and the department shall fix such maximum amount which may be so paid but without regard to any differentiation as to whether the retail installment contract is sold to the licensee with recourse on the seller in the event of the default of the buyer or without such recourse or under an agreement by which the seller agrees to repurchase the specific goods described in the retail installment contract if such buyer in such contract defaults and such goods are repossessed.

The provisions of this section shall not apply to any bona fide loan made to any retail seller which the retail seller is under an unqualified duty to repay as such, and which he has secured as to payment, by the sale, assignment, or transfer of retail installment contracts to the lender.

SEC. 11. Licensees.—No person shall purchase retail installment contracts from a retail seller doing business in this state or engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or trust company, make loans to a retail seller doing business in this state on the security of retail installment contracts or engage in the business of making loans to retail sellers in this state on the security of retail installment contracts unless the department has licensed such person to do such business and has issued to the person a written instrument evidencing the license as in this act provided. Any person who desires to purchase retail installment contracts from retail sellers doing business in this state or to engage in the business of purchasing retail installment contracts from retail sellers doing business in this state or, unless a bank or a trust company, to make loans to retail sellers doing business in this state on the security of retail installment contracts or to engage in the business of making loans to retail sellers doing business in this state on the security of retail installment contracts, shall file an application for a license on forms prescribed by the department and pay the fees required herein.

SEC. 12. Application for License and Fees.—The application for license shall contain:

(a) the name and address of the principal office of the applicant,

(b) if applicant has one or more branches operating in this state, the place of business of each such branch at the date of the application,

(c) the trade name, if any, under which applicant's business is to be conducted, and if applicant is a co-partnership, the

name of every member thereof, and if a corporation, of each officer and director thereof,

(d) the total authorized investment used or to be used in the business in this state and if a corporation, the amount of the capital stock thereof issued and outstanding,

(e) a statement of the total amount of business transacted by it in this state during the fiscal year next preceding the date of the application,

(f) such other information touching the business of the applicant as the department may require.

The department is hereby authorized to prescribe the forms of the application and require such additional information as to it may seem necessary properly to regulate the business of the licensee. The forms prescribed shall require the applicant to agree to give notice to all retail sellers in this state with which it does business, when requested so to do by the department, of any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges as provided in section 26 of this act and to keep in this state, subject to examination, adequate records pertaining to the business done in this state.

The application shall be verified by the proper person and every applicant, other than a bank or trust company or an industrial loan and investment company authorized to issue certificates of indebtedness or investment, shall pay the department the sum of one hundred dollars as an annual license fee at the time of the filing of the application. Any bank or trust company or industrial loan and investment company authorized to issue certificates of indebtedness or investment which

shall apply for a license under this act shall pay the department the sum of ten dollars as an annual license fee at the time of filing of the application. If the period for which the license is to run is less than six months (,) one-half of the annual fee shall be charged. On or before the 20th day of June in each year every licensee shall pay the department the annual license fee provided herein for such licensee for the year commencing on the next succeeding July 1 and shall file an application in the form prescribed by the department. All license fees collected by the department shall be paid into the state treasury and become a part of the financial institution's fund and subject to the provisions of law relating thereto.

SEC. 13. Approval or Rejection of Application.—Upon the filing of any application for license and the payment of the license fee required by this act, if the department shall find that the applicant can operate its business economically and efficiently, it shall thereupon issue and deliver a license to the applicant. In considering economic and efficient operation the department shall take into consideration the fact that this act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope. The license shall authorize the applicant to do the business otherwise prohibited by this act. The license shall remain in full force and effect until it is surrendered, revoked or suspended as in this act provided. If the department shall find that the applicant cannot operate its business economically and efficiently within the scope of this act, it shall not issue a license to the applicant but shall notify the applicant of the denial, and return to the applicant the fee theretofore paid. The department shall give every applicant a reasonable opportunity to be heard with respect to the application, and shall approve or deny, by written

order, every application for license hereunder within thirty days from the hearing thereon.

SEC. 14. Form of License.—The instrument evidencing the license shall be in such form as may be prescribed by the department, and in addition thereto shall contain the following:

(a) the name of the person licensed,

(b) the name of all partners if applicant is a co-partnership,

(c) the principal office of the applicant.

The instrument evidencing the license, or a certified copy thereof provided by the department, shall be kept posted conspicuously in the principal office of applicant and in every branch maintained and operated by applicant in this state.

SEC. 15. Revocation of License.—The department is hereby authorized to revoke or suspend any license issued under this act, if, after hearing, it finds:

(a) that the licensee has refused to permit the department to make any examination authorized hereunder or has failed to pay the cost of any examination made by the department or the annual license fee required hereby or any penalty assessed by the department against the licensee, or

(b) that the licensee has wilfully failed to comply with any rule or regulation of the department lawfully made hereunder, or

(c) that the licensee has wilfully violated any provision of this act, or any rule or regulation of the department lawfully made hereunder, or

(d) that the licensee has wilfully avoided or attempted to avoid the operation or effect of this act by purchasing any retail installment contract or contracts at a less price than the unpaid balance thereon or by entering into any agreement, combination or understanding (,) express or implied (,) with any retail seller the effect of which agreement, combination or understanding may be to avoid or attempt to avoid the operation or effect of this act.

The department shall give any licensee whose license it proposes to revoke ten days' notice in writing of the contemplated action and of the general grounds therefor. Before the license is revoked or suspended, the licensee shall be given reasonable opportunity to be heard. Licensee (license) may be revoked or suspended only by written order. If the department finds that the grounds for revocation or suspension of the license are applicable only to one branch or some branches operated by the licensee, it may revoke or suspend the license as to that branch or those branches only, or it may revoke the right of the licensee to do business as a licensee in this state. No revocation or suspension or surrender of any license shall impair or affect the obligation of any lawful retail installment contract theretofore made.

SEC. 16. Recourse to Court.—Any person feeling aggrieved with any decision of the department made as in this act provided may commence an action in the circuit or superior court of the county in which the business operated by such person is located against said department as defendant to vacate or set aside any such order or decision of the department upon the grounds that any such regulation, order or decision of the department is insufficient, unreasonable or unlawful, in which ac-

tion a copy of the complaint shall be served with the summons. The answer of the department to the complaint shall be filed within ten days after service of summons. All such actions shall have precedence over civil cases not of the same nature pending in any such court and such circuit or superior court shall always be deemed open for the trial thereof and the same shall be tried and determined as other civil actions.

Any such proceeding, action or suit to set aside or vacate any decision or order of the department or to prevent in any way such order or decision from becoming effective shall be commenced and every right of recourse to the courts shall be exercised within thirty days after the entry or rendition of such order or decision and the right to commence any such action, proceeding or suit or to exercise the right of any recourse to the courts shall terminate absolutely at the end of such thirty days after such entry or rendition thereof. Either party to any such action in the circuit or superior court shall have a right of appeal to the supreme court of the State of Indiana as in other civil cases.

SEC. 17. Surrender of License.—Any licensee hereunder may surrender any license theretofore issued to it by the department at any time after ten days' notice to the department in writing stating that the licensee proposes to and does thereby surrender the license as of a certain effective date named. The surrender of a license by a licensee shall not affect the civil or criminal liability or liability for fees or penalties which the licensee may be under by virtue of any act done prior to the surrender of the license.

SEC. 18. Reports of Licensees.—Every licensee hereunder

shall annually on or before the 15th day of March file a report with the department giving such relevant information as the department may require concerning the business and operation of the licensee in this state during the preceding calendar year. The report shall be made under oath and in the form prescribed by the department.

SEC. 19. Examination of Licensees.—The department may at any time investigate the business done in this State by any licensee hereunder, and for that purpose examine the books, accounts, records and files used and maintained by such licensees and their agents, brokers or other representatives. The department may also investigate the business of any person who is not a licensee hereunder and who is doing any business or act, the doing of which is prohibited hereby to persons other than licensees or banks or trust companies. For the purpose of discovering violations of this act and procuring information necessary to fix a maximum finance charge applicable to retail installment contracts, the department in making investigations authorized by this section shall have access to all books, accounts, papers, records, files, safes and vaults of any persons being examined, and may require such persons to attend and testify relative to any transactions or business which may come within the scope of this act. In case of the disobedience on the part of any person to comply with any lawful order of the department or any lawful subpœna, or upon the refusal of any witness to appear and testify to any matter regarding which he may be lawfully interrogated, upon petition of the department setting forth the facts, it shall be the duty of the circuit or superior court of the county of which such person is a resident, or the judge thereof in vacation, to compel obedience to the lawful requirements of the subpœna or order and to compel the

production of necessary and required books, papers, records, documents and other evidence, and upon the failure, refusal or neglect of any person to comply with the order of the court or the judge thereof, such person shall be punished as for contempt of court.

SEC. 20. Costs of Examination.—The department shall prescribe and fix a schedule of fees, which are hereby imposed and shall be charged and collected by the department, for the services rendered and the duties performed by the department, under and by virtue of the provisions of this act in the supervision, regulation and examination of licensees hereunder and the schedule of fees so prescribed and fixed shall be determined in accordance with the provisions of section 35 of the Indiana Financial Institutions Act. For the purposes of this section a licensee hereunder shall be termed a financial institution. The fees fixed and prescribed in the schedule may include the cost incurred by the department in fixing a finance charge under the provisions of this act. No licensee shall be required to pay any fee for examination unless the cost to the department of making such examination shall exceed the license fee paid in compliance with the provisions of this act. All costs assessed by the department at the time of the making of any examination and paid by the licensee shall be paid into the State treasury and become a part of the financial institutions fund and subject to the provisions of law relating thereto. If any licensee refuses to permit the department to make an examination it shall be subject to such penalty as the department may assess, not in excess of one hundred dollars for each day any such refusal shall continue. Any penalty assessed by the department may be collected in an action brought in the name of the State of Indiana on the relation of "The Department of Financial Institutions" in the

circuit or superior court of the county in which the licensee has its principal place of business.

SEC. 21. Contracts to Prevent Competition.—No manufacturer shall sell or contract to sell specific goods which may become the subject matter of a retail installment sale in this State, whether patented or unpatented, to any retail seller in this State on the condition or with an agreement or understanding, express or implied, that the retail seller shall sell, assign or transfer any retail installment contracts arising from the retail installment sales of the goods, or any part thereof, only to a designated licensee or class of licensees, when the effect of the condition, agreement or understanding may be to lessen or eliminate competition, or create, or tend to create, a monopoly in the licensee or class designated. Any such condition, agreement or understanding with any retail seller in this State is hereby declared to be against the public policy of this State and to be unlawful and void.

SEC. 22. Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly, to any retail seller in this state by any manufacturer that the manufacturer will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell, specific goods which may become the subject matter of a retail installment sale in this state, whether patented or unpatented, to the retail seller, unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to any designated licensee or class of licensees, shall be prima facie evidence that the manufacturer has sold or intends to sell such specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 23. Further Acts Tending to Prevent Competition.—Any threat, express or implied, made directly or indirectly to any retail seller in this state by any licensee hereunder that is affiliated with or controlled by any manufacturer that the manufacturer will terminate his contract with or cease to sell specific goods which may become the subject matter of a retail installment sale to the retail seller unless the retail seller sells, assigns or transfers the retail installment contracts arising from his retail installment sales to the licensee making the threat, shall be presumed to be made at the direction of and with the authority of the manufacturer and shall be prima facie evidence of the fact that the manufacturer has sold or intends to sell the specific goods on the condition or with the agreement or understanding prohibited by section 21 hereof.

SEC. 24. Subsidy of Licensees.—No manufacturer shall pay or give or contract to pay or give any thing or service of value to any licensee in this state, and no licensee in this state shall accept or receive or contract or agree to accept or receive, directly or indirectly, any payment, thing or service of value from any manufacturer, if the effect of the payment or giving of any such thing or service of value by the manufacturer, or the acceptance or receipt thereof by the licensee, may be to lessen or eliminate competition or tend to create or create a monopoly in the licensee that accepts or receives the payment, thing or service of value or contracts or agrees to accept or receive the same.

SEC. 25. Rules and Regulations.—The department shall have authority from time to time to make, amend and rescind rules and regulations necessary to carry out and enforce the provisions of this act, including rules and regulations governing the

business done in this state by licensees, the content of reports required from licensees and the manner and extent of examinations made of the business of licensees. Among other things, the department shall have authority to prescribe forms in which required information shall be set forth, items or details to be shown in balance sheets and earning statements and methods to be followed in the preparation of accounts necessary to reflect factors in the business of the licensee to be reckoned with by the department when fixing a maximum finance charge on retail installment contracts. The rules and regulations of the department, other than those issued pursuant to the authority vested in the department by section 26 of this act, shall be published and be effective in the manner and at the time prescribed by the department. No provision of this act imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the department, notwithstanding that the rule or regulation may, after the act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

SEC. 26. Classification of Retail Contracts and Variable Finance Charges.—It shall be the duty of the department and the department shall have power, jurisdiction and authority to investigate retail installment contracts and ascertain the facts with reference to retail installment sales and upon the basis of the ascertained facts:

(a) to classify, by general order, retail installment sales or retail installment contracts arising therefrom, according to such system of differentiation as may reasonably distinguish the classes of retail installment sales or the contracts made in connection with such sales, and

(b) to determine and fix by a general order the fair maximum finance charge that may be contracted for in any retail installment contracts or that may be contracted for in retail installment contracts of any classes which may be established by the department, and

(c) to determine and fix by a general order the fair maximum charges that may be contracted for in any retail installment contract and which may be imposed upon the retail buyer for failure to pay any installment of the time balance when it is due.

The department, in determining the classes of retail installment sales or contracts, shall take into consideration the specific goods sold thereunder, the use thereof, the length of time usually given to the retail buyer in which to pay the unpaid balance owing on any retail installment contracts made in connection with the sales and any other factors which may reasonably afford a basis for the application of different finance charges on retail installment contracts which have or are likely to have the same or substantially the same unpaid balances.

The department, in determining the fair maximum finance charge which may be contracted for in any retail installment contracts or in any retail installment contracts of any classes which may have been established by it, shall take into consideration the availability of credit facilities to individuals who do not have the security generally required by commercial banks and the finance charge which will be necessary in order to induce sufficient amounts of efficiently operated commercial capital to enter into the business of making and purchasing retail installment contracts. The department shall fix charges sufficient

to provide adequate credit facilities for retail installment sales.

The department may, from time to time, upon the basis of changed conditions or facts, reclassify retail installment sales and retail installment contracts, and redetermine and refix any maximum finance charge previously fixed by it, but the new finance charge shall not affect pre-existing retail installment contracts lawfully made. Any and all orders which the department may make respecting classes of retail installment sales or contracts or maximum finance charges shall fix the effective date of the new or changed classification or finance charge, but the effective date shall not be earlier than thirty days after the date when notice of such new or changed classification or finance charge is published. Notice to the public, to retail sellers and to licensees hereunder shall be given by publication of the new or changed classification or finance charge by one publication in a daily newspaper of general circulation printed and published in the English language in the city of Indianapolis. In addition, the department may require licensees hereunder to give notice of such new or changed classification or finance charge to all retail sellers with whom the licensees do business in this state.

Any finance charge fixed by the department under the provisions of this act shall be lawful notwithstanding any other law of this state.

SEC. 27. Duty of Retail Seller and Licensee.—Every person to which this act is applicable shall conduct and transact his business in the manner required hereby and every licensee hereunder shall establish and maintain methods for the conduct of his business and affairs coming within the scope of this act in accordance with the requirements hereof and of any rule or reg-

ulation of the department made in relation thereto and under the authority of this act.

SEC. 28. Waiver of Statutory Protection.—No agreement of any retail buyer before or at the time of the making of any retail installment contract shall constitute a valid waiver of any provisions of this act.

SEC. 29. Violation of Act—Punishment.—Any person who wilfully violates any of the provisions of this act, or the rules and regulations promulgated by the department under the authority hereof or any person who wilfully in any report or account filed in pursuance of any provision of this act or rule or regulation of the department makes any untrue statement of a material fact or omits to state any material fact necessary to give the department the information lawfully required by it, shall upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year or both.

SEC. 30. Interpretation.—This act shall be interpreted and construed in connection with and as supplemental to the Uniform Sales Act, as amended, and the Uniform Conditional Sales Act and any terms used in this act which are defined in either of said acts shall have the meaning given thereto by the aforementioned acts unless the context hereof clearly requires another meaning. Nothing in this act shall be construed to repeal any part of either of the acts mentioned in this section or any existing law of this state relating to interest or consideration that may be charged upon the loan, use or forbearance of money or sale of credit, but this act shall be construed as supplemental thereto.

SEC. 31. Existing Contracts.—None of the provisions of this act shall apply to any sale or to any contract to sell made prior

to the taking effect of this act which if made after this act takes effect would be a retail installment sale or contract and this act shall not affect pending litigation.

SEC. 32. Captions.—No caption of any section of this act shall in any way affect interpretation of this act or any part thereof.

SEC. 33. Severability Clause.—If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 34. Short Title.—This act may be cited as the Retail Installment Sales Act.

SEC. 35. Time of Taking Effect.—This Act shall take effect on the first day of July, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 709 and 710

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Appellee.

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

McHENRY CHEVROLET CO., INC.,

Appellee.

BRIEF FOR APPELLEES IN NOS. 709 AND 710

JOHN THOMAS SMITH,
PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

PAUL V. MCNUTT, Governor of the State of Indiana;
PHILIP LUTZ, Attorney General of Indiana;
RICHARD A. MCKINLEY, Director of The Department of Financial Institutions of the State of Indiana;
OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana;
HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,
Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,
Appellee.

No. 709

PAUL V. MCNUTT, Governor of the State of Indiana;
PHILIP LUTZ, Attorney General of Indiana;
RICHARD A. MCKINLEY, Director of The Department of Financial Institutions of the State of Indiana;
OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana;
HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,
Appellants,

v.

MCHENRY CHEVROLET CO., INC.,
Appellee.

No. 710

APPELLEES' BRIEF

Statement of the Case

INTRODUCTION. In the court below, the hearings in the two cases (Nos. 709 and 710) were consolidated, and but

one brief was filed by complainants as well as by defendants. Although Appellants have filed separate briefs on this appeal, the briefs are identical, except for certain references to the findings of fact. In the interest of clarity and because of the structure and subject-matter of the Act, only one brief is being filed by Appellees on this appeal. For convenience, Case No. 710 will be referred to as the *McHenry* case and Case No. 709 as the *G.M.A.C.* case, and the separate records in each case will be similarly identified. Similarly, Appellee, McHenry Chevrolet Co., Inc., will for convenience be designated as "Retail Seller," and Appellee, General Motors Acceptance Corporation of Indiana, Incorporated, as "G.M.A.C."

The proceedings in the court below have been adequately described in Appellants' briefs. The court's Conclusions of Law, identically phrased in each case, are also set forth (pp. 2 and 3 of McHenry and G.M.A.C. briefs of Appellants).

Inasmuch as the Act has been set out in its entirety in both of the briefs filed by Appellants, as well as in the transcripts of record it is unnecessary to include it in this brief.

The Act

SCOPE: The provisions of the Act may be divided into two groups: The first deals with the business of retail sellers, *i.e.*, the retail sale of goods in instalments and the creation of the instalment contract; and the second with the sale of the contracts by retail sellers and their purchase by companies such as G.M.A.C.

The principal provisions of the Act, briefly, are the following:

(1) Every written instrument evidencing a retail instalment sale is required to set forth specifically the cash price of the goods, the amount of the "down payment", the unpaid balance of the cash price, the cost to the retail buyer of the insurance, the principal balance (*i.e.*, the sum total of the unpaid balance of the cash price plus the cost of insurance), the amount of the finance charge, the time balance (the sum total of the principal balance and the finance charge) owed by the retail buyer, and the number of instalment payments and the amount and date of each payment.

(2) The finance charge to be added to the cash price may not exceed the maximum amount fixed by the Department of Financial Institutions which is authorized to fix this maximum.

(3) The Act gives the retail buyer the right to pay the unpaid balance of the purchase price at any time whether due or not, and authorizes the Department to fix the amount of the "discount" to be given for such prepayment, and also the maximum charges which the retail buyer may be required to pay for failure to meet any instalment of the time balance when it is due.

(4) The Act forbids retail sellers to sell their contracts to anyone except licensees.

(5) The Act requires all purchasers of instalment contracts to obtain a license which may be issued by the Department of Financial Institutions only if the Department finds that the applicant can operate its business "economically and efficiently"; the Department is also authorized to revoke or suspend licenses.

(6) The Act limits the amount which the retail seller may receive for his contracts and also imposes limitations,

—which fail to differentiate between without recourse sales and sales made with recourse to the retail seller or pursuant to repurchase agreements,—upon the amount which licensees may pay retail sellers therefor.

(7) The Act prohibits the making of contracts to prevent competition in the purchase of retail instalment contracts.

(8) The Act requires licensees to submit to examinations and to make reports to the Department of Financial Institutions; authorizes the Department to make rules and regulations governing the business done in the State of Indiana by licensees, and provides certain penalties for violations of the Act.

DEFINITIONS: The Act, in Section 1, defines a retail instalment sale as a sale in which the "cash price" is not in excess of $1,500, may be paid in instalments over a period of time and in which a security interest in the goods is retained by the seller. The term "cash price" is defined as the price, measured in dollars, "agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail instalment sale". In the same Section, the Act defines the term "finance charge" as meaning "any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in instalments over a period of time"; and the term "principal balance" is defined (in Section 4) as the unpaid balance of the "cash price" plus the cost to the retail buyer of the insurance.

The findings of fact show that the "cash price" is the price at which retail sellers sell their goods for cash (McHenry Findings 3-6 inclusive). That the term "cash

price" as used in the Act was intended by the General Assembly to have the same meaning is evident from the Report of the Department of Financial Institutions on which the General Assembly acted, and from the structure and content of the statute itself. The pleadings and the evidence introduced both by Appellees and by Appellants in the lower court clearly showed this to be the construction which both parties gave to the Act, and it was apparently on this construction that Appellants threatened to enforce the Act as applicable to the business of the retail seller (McHenry Record pp. 6 and 36, and see General Orders issued by the Indiana "Department of Financial Institutions" under the "Retail Instalment Sales Act" prior to the permanent injunction herein—McHenry R. 38-46; G.M.A.C. R. 36-44).

The "cash price" is of course a different "price" than the "time price"—the latter being the price which is arrived at *after* the retail seller has added to the cash price the amount which is known as the "finance charge" (McHenry Findings 3-6 inc.). Appellants, however, have advanced the astonishing theory that on a proper construction of the Act *the term "cash price" means the "time price";* that whatever price "is finally agreed upon by the parties must be set out in the conditional sale contract and is the "cash price" as that term is defined in the Act (Appellants' Briefs pp. 27-28). In their brief in the court below (at p. 65) Appellants, in advancing the same theory, set forth their views as to the manner in which the Act, so construed, would apply*:

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*In their briefs on this appeal (p. 11) Appellants state their views on this point as follows:

> "The Act expressly provides that the price of the merchandise referred to in the Act as the "Cash price" means the price agreed upon by the parties *without limitation as to the factors which may be taken into consideration in making the agreement.*" (Italics ours.)

> "The Retail Seller may sell his goods for any price which may be agreed upon between him and the Retail Buyer, and in doing so he may take into consideration the fact that the payment therefor is to be made on time and in instalments and he may fix a higher price on that account. That price, however arrived at, is the price denominated in this Act as the *cash price* which he is required to state in his contract and upon which the 'time balance' is constructed."

We submit that if this interpretation of the statute is correct, the Act becomes an *absurdity*. If this construction is adopted, the retail seller may add to the price at which he would have sold for cash as high a "finance charge" as he may desire to fix—and such a seller would not be subject to the provisions of the Act at all; he would be as free as before the enactment of the statute to include in his time price whatever amount of finance charge he chooses to add to the cash price of his goods. If such is the construction to be given to the Act, its primary purpose, to wit, the regulation of what Appellants are pleased to term "the cost of credit" becomes impossible of achievement; the Act wholly fails of its purpose and, if Appellants are correct in their contention, the Act stands condemned by its own guardians.

Although it is true as Appellants contend (Appellants' Briefs p. 11) that the court, in the construction of a statute, will, if possible, give it a construction in harmony with constitutionality, it is also true that no statute should receive a construction that will render it nugatory, "* * * or which prescribes a rule utterly impractical * * * " (*United States* v. *Tappan, et al.*, 11 Wheat. 419 (at p. 426)).

> *Unity* v. *Burrage*, 103 U. S. 447 at p. 457;
> *Bird* v. *United States*, 187 U. S. 118 at p. 124;
> *Bernier* v. *Bernier*, 147 U. S. 242 at p. 245.

The Issue

The premise of Appellants' argument is that the Act regulates but *one* business, the business "of extending credit" to retail buyers in instalment sales of merchandise, by empowering the fixing of the cost of "extension of credit" in retail instalment sales (Appellants' Briefs, pp. 38 and 16). Arguing from that characterization, Appellants reach the conclusion that the State has the power to regulate instalment sale transactions by fixing the maximum amount of what the Act designates as the "finance charge".

Fearing, however, the "constitutional pitfalls involved in the case of any attempt to fix the price of merchandise generally", Appellants deny the existence of any provision in the Act authorizing the fixing of the prices of merchandise sold in instalment sales, and likewise deny that it was the purpose of the Act to do so. (Appellants' Briefs, pp. 10-11). As has been pointed out above, however, this denial is premised on a construction of the statute which renders it meaningless, as well as totally inconsistent with the admission in Appellants' pleadings that the Act is ". . . applicable to the business of Retail Seller . . .", and with the threatened enforcement of the Act as applied to the businesses conducted by the Retail Sellers (*supra* pp. 5 and 6).

It is Appellees' contention that the fixing of prices is exactly what the Act accomplishes—since it is the sale of goods, and not the "extension of credit" or "loans", that is involved. Stated otherwise, since the time-price differential, or what is termed in the Act the "finance charge", is an integral element in a merchant's instalment sale price the maximum amount of this differential cannot be fixed without fixing the retail instalment sale price of the goods.

It follows that if the Act is to be justified as a valid exercise of governmental authority, the authority it grants to fix maximum "finance charges" in retail instalment sales must be predicated on some basis other than that the transactions are sales of goods. Conversely, if they *are* sales,—at prices payable in instalments rather than in cash,—and if they are not extensions of credit or loans, the Act's interference with the business and transactions of the Appellees cannot be justified. The ultimate issue, then is the determination of the real nature of the transactions affected by the Act. Such a determination cannot be accomplished by characterization or by mere assertions that instalment sales of merchandise constitute an "extension of credit business"; it *can* and *should* be accomplished, however, by an examination of the *facts*.

The basic and primary facts with which the Act deals are the following: —

The Facts

A. *Basic Facts Relating to the Business of McHenry Chevrolet Company, Inc.*

McHenry Chevrolet Company, Inc. is an automobile dealer, selling at retail new and used automobiles for cash or on the instalment plan. From sixty to sixty-five per cent of its sales are instalment or time sales, in which the price fixed in the written contract, which is usually higher than the cash sale price for the same automobile, is known as the time price (McHenry Findings 2 and 3).

The buyer may be quoted the "cash sale price" (or "cash price"), or the time price or both; in many instances of new

car sales the buyer is already acquainted with the cash sale price (McHenry Finding 4). The time price may be determined arbitrarily by the Retail Seller or with reference to charts and other data supplied by G.M.A.C. or other finance companies (McHenry Findings 5 and 18). The retail seller may add whatever amount he desires in arriving at or fixing the time price to the retail buyer (G.M.A.C. Finding 9).

In arriving at its time price the Retail Seller increases the cash price for which it would have sold the automobile if it were a cash sale by an amount which is sometimes designated as the "differential" and which is popularly known as "the finance charge" (McHenry Finding 6; G.M.A.C. Finding 22). There is no agreement between Retail Seller and the retail buyer for a cash sale at a cash price, nor is there any agreement for the buyer's payment of a cash price, as if the sale were for cash, plus an additional amount equal to the difference between the agreed price and the price at which the Retail Seller would have agreed to sell the car if the sale were for cash. The one and only contract between Retail Seller and the retail buyer is the instalment contract of sale and purchase of the automobile at the price agreed to be paid by the retail buyer. (McHenry Finding 6). The buyer is required to make a down payment in cash or its equivalent, generally to the extent of one-third of the cash price (McHenry Finding 8). Instalment sales by the Retail Seller are evidenced by contracts of conditional sale at the agreed time price, which is payable in instalments; the contracts reserve title to the automobile until full payment of the agreed price by the retail buyer (McHenry Finding 5).

Where insurance is not carried by the retail buyer the cost of fire, theft and accidental physical damage, and

usually collision, insurance is a factor which influences the Retail Seller in fixing the time price (McHenry Finding 7; G.M.A.C. Finding 11).

In addition, the time price in instalment sales of merchandise, such as automobiles in this retail seller's case, involves and reflects allowance for other cost and risk factors determined, from experience, as necessary elements in instalment sale prices of merchandise, whether the instalment sale contracts resulting from such transactions are retained and handled by the retail seller or sold to and handled by an assignee; such factors require allowance for cost, expense and loss hazard incident to the handling and collection of the instalment contract obligation and include the investment of capital involved in the sale on credit, expense of investigating the retail buyer's ability to pay, the cost and expense of preparing contracts and other forms, setting up and keeping books and accounts and the manifold tasks in the collection and posting of instalments of the unpaid balance under such instalment sale obligations, the cost of effecting repossessions upon default on the part of the buyer as obligor thereunder, the expense of court proceedings and attorneys' fees, and provision for reserves against the risk of loss due to the buyer's failure to pay and either the seller's inability to repossess the goods at all or excessive depreciation in value thereof, below the amount unpaid, to the prejudice of the resale value of the goods in the event of repossession. (McHenry Finding 10).

The manner in which McHenry Chevrolet Co. Inc. makes instalment sales is typical of instalment sales by most automobile dealers and most dealers in other products, although it is the practice of some merchants in certain

goods and commodities to quote or mark their goods with only a time price from which they may make a reduction for a cash purchase (McHenry Finding 9).

B. *Basic Facts Relating to the Business of General Motors Acceptance Corporation of Indiana, Inc.*

General Motors Acceptance Corporation of Indiana, Inc. is engaged in the business of purchasing retail instalment contracts covering products manufactured by General Motors Corporation or its divisions. Most of the retail sellers with whom G.M.A.C. does business are automobile dealers but it also does business with dealers in electric refrigerators or electric heating equipment or appliances such as vacuum cleaners which are manufactured by General Motors Corporation (McHenry Finding 11; G.M.A.C. Findings 1, 2 and 3). G.M.A.C. and companies engaged in the same kind of business are generally called "finance companies" (McHenry Finding 12). G.M.A.C. buys instalment sale contracts from dealers after the time sale transactions have been consummated; it has no dealings with the retail buyer until after it has purchased the contract from the dealer; as assignee, it then collects from the retail buyer the unpaid balance of the time price according to the retail contract which it has purchased (G.M.A.C. Finding 4; G.M.A.C. Finding 9). G.M.A.C. is not obligated to purchase contracts from the Retail Seller or any other dealer. Neither the Retail Seller nor any other dealer is obligated to sell its contracts to G.M.A.C. or any other finance company (McHenry Finding 12; G.M.A.C. Finding 5). Not all General Motors dealers in Indiana sell their instalment sale contracts to

G.M.A.C., and those dealers which do business with it do not sell all of their contracts to it (G.M.A.C. Finding 5). If G.M.A.C. purchases a contract from the Retail Seller or any other dealer, the purchase is governed by the terms and conditions of the so-called G.M.A.C. retail plan, the details of this plan are set forth in full in McHenry Finding 12 and G.M.A.C. Finding 6.

As a convenience to dealers G.M.A.C. furnishes them with certain material in anticipation of the dealers' offering their contracts to G.M.A.C. for purchase, including forms of retail contracts and rate or payment charts by means of which the dealers are enabled to determine quickly the differential to be added to the cash price in determining the time price of the car which is being sold on the instalment plan; the dealer is not required to use the G.M.A.C. charts or other forms but does so if he expects to offer the instalment contract to G.M.A.C. (McHenry Findings 13 and 14; G.M.A.C. 8). When G.M.A.C. accepts a contract for purchase it is assigned and delivered to G.M.A.C. by the dealer who thereupon receives an amount which, together with the down payment received from the retail buyer, is equivalent to the price which the dealer would have received for a cash sale of the automobile (McHenry Finding 15; G.M.A.C. Finding 8).

The Retail Seller and the retail buyer are the only parties to the instalment contract and sale (G.M.A.C. Finding 9, McHenry Finding 18). G.M.A.C. is not a party to it, and it has and acquires no interest therein unless and until the contract is offered to and purchased by it from the dealer (G.M.A.C. Findings 4 and 9; McHenry Finding 18). The differential used by the Retail Seller in fixing the time price to any retail buyer may be determined by the

dealer solely and independently of G.M.A.C. or any other company in the business of purchasing instalment sale contracts; the Retail Seller may add whatever amount he desires in arriving at or fixing his or its time price to the retail buyer, the Retail Seller may not even intend to dispose of the contract, but even if it should desire to do so, it is not able to determine, when fixing the time price, whether the installment sale contract will be purchased by G.M.A.C. or some other company, because the latter have no obligation whatever to purchase contracts offered by dealers; and the Retail Seller cannot determine whether it may be required to hypothecate the contract with a bank or other financial agency or be forced to carry it (McHenry Finding 18).

After G.M.A.C. has purchased the contract from the dealer, if insurance coverage is to be provided G.M.A.C. purchases and pays for the policy of insurance protecting the buyer and G.M.A.C. against loss by fire, theft, accidental physical damage, and, in most cases collision. In such cases a certificate of insurance for which G.M.A.C. pays is sent to the retail buyer by G.M.A.C. (G.M.A.C. Finding 11). In addition to the cost and expense of handling and collecting the contracts and repossession of the property whenever necessary, G.M.A.C. assumes under the terms of its retail plan all risk of loss resulting from its inability to collect from the retail buyer any part of the unpaid price obligation under the contract purchased from the dealer and resulting from its inability to repossess the property either because the latter has been put out of its reach or for some other reason; the dealer's contingent liability on the assignment of the contract to G.M.A.C. is limited by the terms of the G.M.A.C. retail plan so that the dealer incurs no liability as a consequence of the retail buyer's failure to pay

the balance of the price, except when G.M.A.C. effects repossession of the property and delivers it to the dealer (G.M.A.C. Finding 12). In such a case the dealer may or may not sustain a loss, depending on the resale value of the property as compared with the amount the dealer may have to pay G.M.A.C. (G.M.A.C. Finding 13). In recognition of this loss on the part of the dealer G.M.A.C. sets up and credits a reserve account in the dealer's favor with a stipulated portion of G.M.A.C.'s differential in the price paid by it on the purchase of the contract; and periodic payments are made to the dealer out of this accumulated reserve (G.M.A.C. Finding 14).

If G.M.A.C. accepts and purchases retail contracts from dealers, it takes over from the latter and assumes numerous duties and tasks involved in the ownership acquired in the contracts by setting up an account for each of them and handling the collection of the instalments payable under the contracts, court proceedings and repossession of the property; for those purposes, G.M.A.C. maintains an extensive organization, equipment and personnel engaged in carrying on the various functions of its business in buying acceptable contracts, collecting same and protecting its investment therein, at considerable items of cost and expense for salaries, borrowing of money for the supplying of capital to maintain a volume of new business, organization expenses and the like (G.M.A.C. Finding 10).

Most of the finance companies doing business in Indiana, as well as G.M.A.C., furnish similar forms of contracts, data and material to retail sellers generally, in the same manner that they are furnished to General Motors Corporation's dealers by G M.A.C.; the facilities of many, not less than one hundred forty, such companies, located

in Indiana and engaged in the business of purchasing retail instalment sale contracts from retail sellers, are available to dealers; the method of doing business of these companies is essentially identical with that of G.M.A.C., except as pointed out in G.M.A.C. Finding 17 (McHenry Finding 22; G.M.A.C. Findings 15 and 16).

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The foregoing outlines the basic facts, as found by the Court below, relating to the businesses with which the Act deals. Other findings of fact material to the determination of this appeal will be referred to in the argument.

Summary of Appellees' Argument

Point I.

The Act is unconstitutional and void in that it deprives the McHenry Chevrolet Company, Inc. of its property without due process of law by authorizing the fixing of prices of all automobiles sold by the McHenry Chevrolet Company, Inc. in retail instalment sales.

A. *The Act fixes the instalment sale prices of all commodities having a cash price not in excess of $1,500.*

Hogg v. *Ruffner,* 66 U. S. 115.

B. *Legislative price-fixing of all commodities is beyond the power of any state.*

Chas. Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522;
Williams v. *Standard Oil Co.,* 278 U. S. 235;
Ribnik v. *McBride,* 277 U. S. 350;
Tyson v. *Banton,* 273 U. S. 418.

Point II.

The Act cannot reasonably be deemed to promote the public welfare; the circumstances do not vindicate the Act as a reasonable exertion of governmental authority; and the Act has no reasonable relation to and is not adapted to a proper legislative purpose.

Williams v. *Standard Oil Co., supra;*
New State Ice Co. v. *Liebmann,* 285 U. S. 262;
Nebbia v. *New York,* 291 U. S. 502.

A. *The "factual basis" for regulation urged by Appellants is not supported by the Findings of Fact.*

B. *The alleged existence of "abuses" in the business of retail instalment selling or in the business of purchasing retail instalment contracts does not furnish justification for the fixing of all prices in retail instalment sales.*

Chas. Wolff Packing Co. v. *Court of Industrial Relations, supra;*
Tyson v. *Banton, supra;*
Fairmont Creamery Co. v. *Minn.,* 273 U. S. 1;
Ribnik v. *McBride, supra.*

Point III.

Sections 9, 10 and 15(d) and Section 6 and 26(c) of the Act are unconstitutional and void in that they deprive McHenry Chevrolet Company, Inc. of its property without due process of law; and Sections 9, 10 and 15(d) and Section 13 are unconstitutional and void in that they deprive G.M.A.C. of its property without due process of law.

Panama Refining Co. v. *Ryan,* 293 U. S. 388;
Schechter v. *United States,* 295 U. S. 495;
Nichols v. *Fearson,* 7 Peters 103.

POINT IV.

If the provisions of the Act authorizing the fixing of maximum finance charges are invalid, all related provisions including those which regulate the sale and purchase of retail instalment contracts, being appendant to such provisions, must fall with them and therefore be declared invalid.

Williams v. *Standard Oil Co., supra.*

ARGUMENT

POINT I

The Act is unconstitutional and void in that it deprives the McHenry Chevrolet Company, Inc. of its property without due process of law by authorizing the fixing of prices of all automobiles sold by the McHenry Chevrolet Company Inc. in retail instalment sales.

A. *The Act fixes the instalment sale prices of all commodities having a cash price not in excess of $1,500.*

The trial court found that all instalment sales made by the McHenry Chevrolet Company Inc. are made at an agreed time price, and that the finance charge is an integral part of that price (McHenry Findings 3, 5, 6 and 18). Under the Act (Sections 6 and 26) the finance charge may not exceed the maximum amount authorized by the Department

of Financial Institutions. To fix this maximum is therefore to fix the maximum price at which retail sellers may make instalment sales of automobiles or any other goods having a cash price not in excess of $1,500.

This conclusion is based on the plain provisions of the Act as applied to the facts found by the trial court, and on a construction of the Act's provisions (*supra* pp. 5, 6) which gives effect to the purpose ascribed to it by Appellants; any other construction would nullify that purpose (*supra* p. 6).* So construed, the Act unquestionably fixes retail instalment prices since it is established as a matter of law,—as is apparently conceded by Appellants (Appellants' Briefs pp. 28-29)—that the time-price differential, or what the Act defines as the "finance charge", is an integral part of the time price. As early as the year 1861, this Court held that the difference between the cash price and the time price in an instalment sale is not interest, and that a sale on instalments "has none of the characteristics of usury". *Hogg* v. *Ruffner*, 66 U. S. 115 at 119. Numerous as have been the decisions since that date—a few, including the leading *Indiana* cases, are cited in the footnote**—none has ques-

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*Appellants concede that on this construction of the Act " * * * the right of the seller to name his price * * * " would be put in issue (Appellants' Briefs p. 29, lines 7 and 8).

**_Newkirk_ v. _Burson_, 28 Ind. 435; _Stevens_ v. _Grossman_, (Ind. App., 1935) 196 N. E. 123; _Porter_ v. _Stolkin_, (Ind. App., 1936) 200 N. E. 74; _In re Bibbey_, 9 F. (2d) 944; _Daniel Bros._ v. _Commissioner_, 28 F. (2d) 761; _General Motors Acceptance Corporation_ v. _Mid-West Chevrolet Co._, 66 F. (2d) 1; _Commercial Credit Co._ v. _Tarwater_, 215 Ala. 123, 110 So. 39; _Pacific Finance Corporation_ v. _Lauman_, 95 Cal App. 541, 273 P. 48; _Zazzaro_ v. _Colonial Acceptance Corporation_, 117 Conn. 251; 167 Atl. 734; _Gilbert_ v. _Hudgens_, 92 Colo. 571; _Davidson_ v. _Davis_, 59 Fla. 476, 52 So. 139; _Manufacturer's Finance Trust_ v. _Stone_, 251 Ill. App. 414; _Parker_ v. _Coburn_, 92 Mass. 82; _Hayes_ v. _Commissioner_, 261 Mass. 134; _Hartwick Lumber Co._ v. _Perlman_, 245 Mich. 3, 222 N. W. 147; _Keefe_ v.

tioned the fundamental principle that retail sellers may have one price for a cash sale and a higher price for an instalment sale; that the difference between the cash price and the time price is not interest and that a sale on instalments has "none of the characteristics of usury".

The Indiana Act fixes definite limits upon the right of a retail seller to fix his own time price by empowering the Department of Financial Institutions to fix the maximum finance charge which he may add to the cash price in determining the time price—not only of automobiles *but of every other commodity the cash price of which does not exceed $1,500.*

B. *Legislative price fixing of all commodities is beyond the power of any State.*

We believe it to be established beyond question that legislative price fixing of ordinary commodities of sale is beyond the power of a State Legislature.

> *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522;
> *Williams* v. *Standard Oil Co.,* 278 U. S. 235;
> *Ribnik* v. *McBride,* 277 U. S. 350;
> *Tyson* v. *Banton,* 273 U. S. 418.

It follows therefore that it is beyond the power of a State Legislature to fix the prices of *all* commodities selling for

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Bush and Lane Piano Co., 247 Mich. 82, 225 N. W. 585; *Commercial Credit Co.* v. *Shelton,* 139 Miss. 132, 104 So. 75; *Grand Island Finance Co.* v. *Fowler,* 124 Neb. 514, 247 N. W. 429; *Saylor* v. *Brady,* 63 N. D. 471, 248 N. W. 673; *Pierce* v. *C. I. T. Corporation,* 170 Okla. 633, 41 P. (2d) 481; *Conway* v. *Skidmore* (Wyo., 1935), 41 P. (2d) 1049.

cash at not in excess of $1,500. We do not believe that the underlying principles of these cases have been altered or overruled by the recent decision of this Court in *Nebbia* v. *New York*, 291 U. S. 502—upon which Appellants seem to place their principal reliance.

We believe the following to be the *ratio decidendi* of the *Nebbia* case: Although "* * * there is no closed class or category of business affected with the public interest * * *", it is nevertheless the function of the Courts in connection with the Fourteenth Amendment "to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory". A definite limitation exists upon the freedom of a State *to adopt an economic policy:* the economic policy must be one which "may reasonably be deemed to promote the public welfare". This limitation, moreover, is in addition to the requirement that the law, once the policy is adopted, must be "adapted to its purpose" and that it "* * * have a reasonable relation to a proper legislative purpose".

It is only if State legislation meets all of the foregoing requirements that any presumption exists in favor of its validity. It is submitted that none of them is met by the legislation under consideration.

POINT II.

The Act cannot reasonably be deemed to promote the public welfare; the circumstances do not vindicate the Act as a reasonable exertion of governmental authority, and the Act has no reasonable relation to and is not adapted to a proper legislative purpose.

A. *The "factual basis" for regulation urged by Appellants is not supported by the Findings of Fact.*

The premise of Appellants' entire argument that the circumstances constituting the "factual basis" for regulation vindicate the Act as a reasonable exertion of governmental authority in the promotion of the public welfare is this: There is only one "business" whose regulation is provided for by the Act; this business which Appellants term "the business of financing retail instalment sales" is used "by a considerable portion of the people of the State * * *" Appellants' Briefs pp. 3, 9); the usury statutes are "inadequate" to effectually regulate such business, and the Act was adopted in order to "protect" the retail instalment buyer by "* * * providing for the fixing of maximum finance charges, which bears a similar relation to the established method of financing retail instalment sales as interest bears to the forbearance of money * * *" (See Appellants' Briefs p. 43); the "net result or effect of the transaction is the loan of money". While admitting that there is nothing "* * * in the transaction that in a strict sense can be called the loan of money * * *", they argue (Appellants' Briefs p. 38) that the net result or effect of

the "combined relationship between the retail seller, the retail buyer and the finance company constitute a method of doing business * * *" which Appellants contend, at least inferentially, is merely a "method of defeating usury laws * * *" (Appellants' Briefs p. 32).

The findings of fact do not support Appellants' premise that there is only *one* business whose regulation is provided for by the Act. On the contrary, these findings establish that the businesses of the Appellants are entirely separate businesses, and that the business of McHenry Chevrolet Co. Inc. is completely independent of that of G.M.A.C. The Trial Court found: that the business of McHenry Chevrolet Co. Inc. is that of a retail seller of automobiles (McHenry Finding 1); that the business of G.M.A.C. is that of purchasing retail instalment contracts arising out of the retail instalment sale of automobiles and other General Motors products (G.M.A.C. Finding 2); that McHenry Chevrolet Co. Inc. is entirely free to add to its cash price whatever finance charge it pleases in arriving at the time price and that the time prices which it fixes may be arbitrarily determined by McHenry Chevrolet Co. Inc. or with reference to charts furnished by G.M.A.C. or by any other finance company (McHenry Findings 5, 10 and 18; G.M.A.C. Findings 4, 5 and 9); that G.M.A.C. has no dealings whatsoever with the retail buyer until after the instalment sale has been completed and it has purchased the contract from the Retail Seller (McHenry Finding 18; G.M.A.C. Findings 4 and 9); that McHenry Chevrolet Co. Inc. is entirely free to retain ownership of its retail instalment contracts or to dispose of them to G.M.A.C. or any other finance company, bank or other third party if it so chooses (McHenry Findings 12 and 18; G.M.A.C. Finding

5); and that G.M.A.C. is entirely free to purchase or not, as it pleases, such contracts as may be offered to it by McHenry Chevrolet Co. Inc. or any other retail seller (G.M.A.C. Finding 5).

The Findings of Fact (*supra*, pp. 8 to 15) show that G.M.A.C. has nothing to do with the transaction between the retail seller and the retail buyer. The differential used by the retail seller in fixing the time price to the retail buyer is determined by the dealer independently of G.M.A.C. or any other finance company. When the retail seller makes the instalment sale he may intend to keep the retail instalment contract or offer to sell it to G.M.A.C. or to some other third party. Moreover, when he makes the sale and fixes the time price of his goods he does not know whether, if he offers it for sale, G.M.A.C. or some other company will purchase it or whether he may be forced to keep it. That being so, it is pure fiction to conceive of the dealer as being anything but independent in the conduct of the instalment sale and in his determination of the amount of the time price. It is *his* transaction with his customer, and it is none the less his because he may intend to sell the contract to G.M.A.C. or some other company, or because subsequently he actually does sell the contract. If the retail seller has a chart supplied by G.M.A.C. he may use it or not as he pleases, and if he does use it he may or may not offer the contract to G.M.A.C. When he uses the chart to assist him in determining a time price differential corresponding to the indicated G. M. A. C. discount, he does so because of his willingness to accept G.M.A.C.'s discount as the criterion, from an experienced source, of the amount necessary to cover the cost and risk factors in the event that he should elect not to offer it to G. M. A. C.

or in the event that he is unable ultimately to sell the contract to G.M.A.C. This of course does not justify the conclusion that he is not free and independent in his transaction with the retail buyer.*

It follows therefore that the factual premise upon which Appellants have attempted to build their argument that only one business,—that of "financing retail instalment sales" —is subjected to regulation by the Act, must fail, and with it the allegation that a "relationship" exists between retail sellers, retail buyers and finance companies which is merely a "method of defeating usury" laws. The Report of the Department of Financial Institutions, on which the Legislature acted in drafting the statute, clearly differentiates as between the business of dealers and the business of finance companies, and makes it clear that the Department was recommending restriction of the origi-

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*The independence of the business of the automobile dealer from that of G. M. A. C. has been judicially recognized in several decisions. These decisions involve the question of whether the purchase by G. M. A. C.'s parent New York corporation, in one state, of contracts from dealers in another state, constitute doing business in the latter state. For example, in *Jones* v. *GMAC*, 205 Ky. 227 at p. 229, 265 S. W. 620 at p. 621 (recently cited and quoted along with others in *GMAC* v. *Huron Finance Corporation* (S. D., 1935), 262 N. W. 195 at p. 197), the Kentucky Court said:

> "* * * It has no contract with the dealer, and is not obligated to discount any of his paper, nor is the dealer obligated to transact any of his business with the appellee. He forwards only such notes as he may desire to have discounted by the appellee, and the latter discounts only such of those notes as it may desire to handle. Each transaction is separate and distinct, is not made pursuant to any contract, and is not consummated until the appellee has satisfied itself as to the credit rating of the maker of the note and of the dealer, and has agreed to and does discount the note. *The dealer does not represent the appellee, nor has either any interest in or control of the business of the other.*" (Italics ours.)

nal contract between the buyer and the seller—*both in the case of dealers "* * * who hold their own paper. * * *" and in the case of dealers who dispose of their paper to finance companies.* (See last sentence of McHenry Finding 26; G.M.C.A. Finding 21). From the structure of the Act itself, moreover, it is apparent that the primary purpose of the Legislature was to limit the time-price of goods, and it was only to make such limitation effective that additional provisions were incorporated in the Act relating to the business of finance companies.

Appellants' thesis, that the Act is vindicated as a reasonable exertion of governmental authority because, to use Appellants' characterization, a loan or extension of credit is involved, begs the question: Appellees do not disagree with the propositon that it is a legitimate exercise of police power to regulate loans and a loan business, nor do they dispute the authorities which justify the protection of a necessitous borrowing public through the so-called usury statutes. The question under discussion is not solved, however, by the characterization of the difference, exclusive of insurance, between a cash price and a time price in sales of merchandise as "effective rates of interest for the extension of credit" (G.M.A.C. R. p. 62; McHenry R. p. 66). Nor is it determined by the fact that the Act termed the difference a "finance charge". *The Legislature cannot, by using a phrase to suit its own purpose, obliterate or ignore the essential nature of a transaction.* When another legislature attempted to do the same thing in respect of a classification of tangible and intangible property, the Nebraska Court said, in the case of *Moeller, McPherrin & Judd* v. *Smith*, 127 Neb. 424, at p. 433, 255 N. W. 551, at pp. 555 and 556:

> "Can the Legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the Legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? Tangible is the direct opposite of intangible; and can the Legislature, under the guise of calling it two separate classes of tangible property, include all intangible property under class 2 of tangible property? In our opinion, there is a limit to the Legislature's power to nullify and circumvert constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word."

Similarly, this Court has refused to be bound by any characterization of a state statute so far as it may have a bearing upon the question of the constitutional effect of the legislation, and even though the highest court of the state may have approved the characterization. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346. To like effect are *Quaker City Cab Company* v. *Pennsylvania,* 277 U. S. 389; *New York P. & N. Telegraph Company* v. *Dolan,* 265 U. S. 96; and *Carpenter* v. *Shaw,* 280 U. S. 363.

The instalment sale transaction between the Retail Seller and the retail buyer is a genuine sale of merchandise at the Retail Seller's price. The Retail Seller may have one price for a cash sale and another for an instalment sale, and it is well settled (*supra* p. 18) that the difference between the two prices does not constitute, nor is it comparable to, interest. The difference between the two prices reflects the cost and risk-of-loss factors involved in time-sales as compared with cash sales, and the transaction with the

retail buyer is none the less a sale and the time-price none the less a sale-price because the Retail Seller permits the buyer time in which to pay part of the price in instalments.

Instalment sale transactions are just as much sales as those of the department store which sells goods to certain of its customers on open credit, or, as it is popularly known "charge account". The misleading inference created by Appellants' misuse of the word "credit" throughout their briefs is exposed by a closer scrutiny and an accurate application of the term, from which it will be seen that the retail buyer's "credit" is involved only to the extent and in the sense of his ability to pay *the whole price* in the case of the department store charge-account sale, and in the case of a merchant's instalment sale of goods, the *balance of the price.*

Appellants admit the inadequacy of existing usury laws "* * * to cope with the cost of credit in transactions of this character, * * *" (Appellants' Briefs, page 12). They urge that the usury laws are not "* * * the uppermost limits to which a state may go in advancing the general prosperity and welfare of its citizens through control of the cost of credit" (Appellants' Briefs, page 13). It is submitted that these statements are equivalent to an admission, and constitute merely another way of saying, that usury statutes cannot be made the foundation of the power to fix time prices *because* the instalment sale transaction is not an "extension of credit" or a "loan" and because, as this Court has said, the instalment sale transaction "* * * has none of the characteristics of usury." *Hogg* v. *Ruffner,* 66 U. S. 115, at page 119. To avoid the "constitutional pitfalls" which, as conceded by Appellants, would obstruct the path to control of merchants' prices in instalment sales of all commodities, the Act has been given a surface-

coat of constitutional validity by painting its subject matter in terms of "extending credit" and of "finance charges." Stripped of such characterization, the Act is sought to be upheld on the ground that the existing usury laws are "inadequate" in this situation, even though enactment of this statute would mean a distortion of the concept of such laws, and a claim of untrammeled power in the General Assembly of the State of Indiana to control the prices of all goods sold in instalment sales, a power unlimited by the restraining hand of due process, to which Appellants pay only passing lip service.

In their argument on this point Appellants say that a "considerable portion of the people of the State" make instalment purchases,* and particularly "small wage earners or necessitous persons" (Appellants' Briefs pp. 9, 32), and appear to urge that the same justification, from the standpoint of the promotion of the public welfare exists for this statute as justified the enactment of usury statutes.**

It is obvious that neither the same nor similar historic or factual reasons of public policy can be advanced to justify fixing the maximum by which the time prices on goods may exceed their cash prices. Both American and English usury statutes rely for their justification upon the protection which they are intended to afford the indigent,

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*This Court has repeatedly held that neither the size of a business nor the extent to which the commodities of a business are used may be urged in support of a price fixing statute.

Williams v. *Standard Oil Co.*, 278 U. S. 235;
New State Ice Co. v. *Liebmann*, 285 U. S. 262.

**Appellants have commended to the attention of this Court (Appellants' Briefs p. 30) an article by Raoul Berger entitled "Usury in Instalment Sales" in Volume II of Law and Contemporary Problems, pp. 148-172. Since Appellants have omitted to do so, we respectfully call to the Court's attention the "Commentary" on this article, contained in the same issue of Law and Contemporary Problems and written by one of the authors of this brief.

necessitous and oppressed borrower from the "rapacity" of the lender.* It has been frequently said that such a borrower is deemed to be in the same category with persons under legal disability; as expressed by this Court in the case of *Nichols* v. *Fearson,* 7 Peters 103, at page 111: "The acts against usury were intended to protect the needy; * * *".

The Indiana Retail Installment Sales Act is not for the protection of the "necessitous", because the instalment buyer cannot be said to be "necessitous". He is moved only by desire, and not by necessity. He is a free agent in a competitive market (McHenry Findings 39 and 42; G.M.A.C. Findings 34 and 37). He is as much a voluntary buyer of goods as is a cash buyer; he needs no more protection than does a cash buyer having substantially the same financial means; he can take his time or he can wholly refrain from purchasing until he has accumulated the funds necessary to buy for cash. As stated by the court below in Finding No. 39 in the *McHenry* case (Finding 34 in the *G.M.A.C.* case):

> "The purchase of an automobile or other desired merchandise on time is the gratification of the buyer's preference for the present use and enjoyment thereof which is made available to him by the method of instalment purchase, as against deferring present use and enjoyment until he has accumulated sufficient funds to make a cash purchase, and, except for the down payment, as against paying out of accumulated capital, as for example, balances in commercial or savings banks. In order that the retail buyer may purchase the merchandise on time,

*It is significant in this connection to note that the State of Indiana has recognized that corporate borrowers do not need the protection afforded by usury statutes and accordingly has enacted a statute which takes away from the corporate borrower the defense of usury. Baldwin's Indiana Statutes, 1934, §§ 9993, 9994, 9995, 9996.

> his ability to make the necessary down payment and to pay the instalments of the time price must be demonstrated and established to the satisfaction of complainant."

This finding establishes not only that the retail buyer is a voluntary buyer but it also establishes that he is a buyer who must have the means to make a substantial down payment and sufficient income to satisfy the retail seller as to his ability to pay the balance of the price. The distinction between the necessitous borrower and the instalment buyer is further emphasized by the fact that the latter acquires a new asset in the purchase he makes, whereas the needy borrower in most cases employs the proceeds of his borrowing to discharge a previously existing debt. As stated (at page 59) in the Report of the Wisconsin State Banking Commission (*infra*, p. 39.):

> "Furthermore, the Committee feels that there are reasons in requiring a maximum rate on cash loans which do not exist under merchandise instalment credit. In a great many instances, cash loans are predicated upon emergencies which are so urgent that the borrower will make almost any sacrifice to make a loan. This makes him an especially easy subject for exploitation."

The Act, furthermore, does not affect, except possibly to a slight extent, the needy or the poor: It was stipulated between Appellants and Appellees (McHenry Record p. 79 ff.; G.M.A.C. Record p. 76 ff.) that for the purpose of this appeal the special findings of fact might be treated as supported by the evidence, with the exception of Finding No. 40 in the *McHenry* case (which is the same as Finding No. 35 in the *G.M.A.C.* case.) This finding to which Appellees object as not being warranted by the evidence reads as follows:

> "There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts."

The evidence relevant to this finding is set out in full in the stipulation (McHenry Record p. 79 ff.; G.M.A.C. Record p. 76 ff.).

It is submitted that Appellants' own evidence on which this finding was based fails to support it. The affidavit of Mr. Edwards, submitted by Appellants, refers to income groups of $1000 and $2400, and states that most of the families *in these groups* could not purchase commodities normally sold on the instalment plan out of accummulated savings. Giving Appellants' evidence its broadest interpretation, the last sentence of the finding should therefore have read: "Families in these two income classes constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts". So corrected, the finding would be consistent with the evidence submitted by Appellees (see affidavit of Milan V. Ayres, Secretary and Analyst of the National Association of Sales Finance Companies, McHenry Record pp. 81-83; G.M.A.C. Record pp. 78, 79), that the Act will not affect to any substantial degree the necessitous or the people whom the defendants characterize as having "little bargaining power" (affidavit of Edward E. Edwards, McHenry Record p. 81; G.M.A.C. Record p. 77). This is true because families having total annual incomes of less

than $1,000 are obliged to spend practically their entire income for the primary necessities—food, fuel, shelter and clothing—which, except for a negligible percentage of the sale of clothing, are not sold on the instalment plan. There being no evidence to the contrary in the Record, it is submitted that the finding in question should have been supplemented so as to incorporate the additional record-fact—of which, as a matter of fact, this Court, without such finding, might properly take judicial notice—*that the Act is not for the protection of the needy or the poor since the purchases which they make on the instalment plan constitute only a negligible part of total retail instalment sales.*

In their argument on this point Appellants invoke vaguely the unequal "bargaining power" of installment buyers (Appellants' Briefs pp. 24-25) as a circumstance upon which they attempt to vindicate the price-fixing provisions of the Act. If that phrase is intended to mean anything other than that retail instalment buyers are in the same class as necessitous borrowers, then its speciousness as the basis for controlling the maximum by which a merchant's time price may exceed his cash price is apparent from the fact that, given a *voluntary* buyer in the market to buy an item of merchandise, his power is as equal or as unequal, in a cash as in an instalment purchase. If the phrase has any significance in the constitutional aspects of this case, it is submitted that to be consistent Appellants would have to be prepared to support the validity of an Act fixing generally the *cash prices* as well as the time prices of all goods selling in a specified price-range.

It follows from the above that the Indiana Act cannot be vindicated as a reasonable exertion of governmental au-

thority for the promotion of the public welfare by the analogy which Appellants seek to create between the "factual basis of regulation" underlying this Act and the historical and factual justification for the so-called "Usury Statutes". *As was stated by this Court in the case of Hogg* v. *Ruffner* (*supra*), *a sale on instalments has "none of the characteristics of usury".* This case and the numerous decisions to the same effect (*supra*, pp. 18, 19) establish that instalment sales do not come within the usury laws. They stand for the proposition that a state cannot control an instalment sale on the ground that it is a loan. The same facts, the same reasons and the same considerations that underlie those decisions support the objection to the attempted regulation of such sales under this Act. The retail instalment sales which those decisions hold are not subject to or within the purview of the usury laws are the same retail instalment sales which this Act seeks to control, —on the same erroneous conception of the nature of such sales as was rejected in those cases.

B. *The alleged existence of "abuses" in the business of retail instalment selling or in the business of purchasing retail instalment contracts does not furnish justification for the fixing of all prices in retail instalment sales.*

Appellants say (Appellants' Briefs p. 10) that the purpose of the Act "* * * is to prevent extortionate and unreasonable prices for credit extended in retail instalment sales of goods * * * and to prevent certain practices, in their nature fraudulent, which have arisen out of the combination of the retail seller and the finance company in the modern business of sales financing".

"Extortionate Charges": The findings of fact are barren of any proof that "extortionate and unreasonable" finance charges prevail in Indiana. On the contrary the findings disclose effective competition,—the existence of which is inconsistent with extortionate "finance charges,"—not only in the business of retail sales of automobiles and other goods having standard prices but also in the business of purchasing retail instalment contracts (McHenry Finding 42; G.M.A.C. Finding 37). A material and important factor in this competition *is the amount of the time price,* and therefore the amount of the finance charge (McHenry Finding 42; G.M.A.C. Finding 37). Automobile instalment sales in Indiana constitute more than 60% of all retail instalment sales of automobiles (McHenry Finding 38; G.M.A.C. Finding 33); and other goods having standard prices such as oil-burners, refrigerators and other household appliances are also largely sold in instalments. The record shows (McHenry Finding 42; G.M.A.C. Finding 37) that the amount of the time price is a competitive factor the importance of which "* * * is emphasized by the interest * * *" which the automobile and other manufacturers have "* * * in maintaining, for competitive reasons, the retail instalment prices, as well as the cash prices of their products, as low as possible. (the word "instalment" in this finding was omitted in error in the printing of the Transcripts of Record.) In the light of these findings the averment made by Appellants (Appellants' Briefs p. 11) that the General Assembly "* * * might well have considered that extortionate charges for credit in retail installment sales * * * prevailed in Indiana * * *" cannot be supported.

The Indiana Legislature had before it the report of the Department of Financial Institutions, a considerable por-

tion of which was "devoted to finance companies and what the report characterized as their 'effective rates of interest for the extension of credit' " (Appellants' Briefs p. 5). This report was in evidence in the court below and the treatment of "rates" in the Report is summarized in the Findings of Fact (McHenry Finding 28; G.M.A.C. Finding 23),—together with other evidence relating to the question of "finance charges". Nowhere in the Finding is there a statement, or even a suggestion that the prevailing finance charges included in time prices in Indiana, or the prevailing "discounts" of finance companies, are either "unreasonable" or "extortionate". As the basis for alleging the existence of "extortionate charges" Appellants rely *solely* on examples of certain "variations" in finance charges. These "variations" are emphasized and italicized by Appellants in their briefs (p. 5) *but Appellants significantly omit to italicize (and, in their argument at pages 20 and 21 of their brief, to mention) the fact, separately paragraphed in this Finding, that the variable factor of insurance cost and the other variable factors mentioned "* * * account for part of the variation in amounts, the extent of which cannot be determined from the evidence".* Significant, too, we think is the failure of Appellants, in commenting upon this finding, even to mention the G.M.A.C. time-price differentials "which are generally made use of by retail sellers in arriving at the time prices at which they sell at retail new and used automobiles manufactured by General Motors Corporation or its divisions". We say "significant" because the figures showing the G.M.A.C. time-price differential *are the only figures in this Finding having any evidenciary value because they were determined after segregating the all-important factor of insurance cost;* because G.M.A.C. and other fac-

tory affiliated companies purchase together more than 60% of all of the instalment contracts arising out of retail automobile instalment sales in the State of Indiana (McHenry Finding 38; G.M.A.C. Finding 33); and because the finance charges of other retail sellers and the "discounts" of other finance companies, banks and small-loan companies—because of the admitted competitive situation (McHenry Finding 42; G.M.A.C. Finding 37)—must necessarily conform to those prevailing in the sales of General Motors products and in the purchase of instalment paper resulting from such sales.

There being no evidence, then, in either Record of the prevalence or even of the existence of "extortionate" or "unreasonable" finance-charges in retail instalment sales in Indiana, it follows that Appellants cannot place reliance on this contention in their attempted justification of the Act's validity.* With this element removed from Appellants' "factual basis for regulation", there remains of their thesis but one other ground on which they attempt to justify the validity of the price-fixing features of the statute—*i.e.*, the alleged existence of certain "fraudulent" practices in the business of retail sellers and in the business of finance companies.

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*The findings of fact in both the *McHenry* and *G.M.A.C.* cases not only prove the non-existence of exorbitant charges (*supra*); they also establish, by proof of the existence of free competition among retail sellers and among finance companies (*supra*), the absence of any "arbitrary control to which the public might be subjected without regulation" (*Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 at p. 538). Consequently, the findings of fact effectively exclude both the business of McHenry Chevrolet Co. Inc. and the business of G.M.A.C. from the third of the three categories of businesses "affected with a public interest" defined by this Court in the *Wolff Packing Co.* case.

"Abuses":—Appellant's contention that "abuses" which are "* * * detrimental to the public welfare * * *" exist in the "* * * business of financing retail instalment sales * * *" (Appellants' Briefs p. 3) amounts to this*: (1) Retail seller in fixing the time price of an automobile does not insert as a separate item in the written contract signed by the buyer the dollar amounts of the various elements which enter into the make-up of that price (McHenry Finding 27; G.M.A.C. Finding 22); (2) the retail buyer *might* not know the dollar amount of these elements (although the Findings establish that he *may* know and that if he does not know he may upon inquiry ascertain them); (Appellants' Briefs p. 6; McHenry Findings 4 and 27; G.M.A.C. Finding 22); (3) If, after the time sale of the automobile has been completed, the retail seller should sell the instalment contract, he *may* eventually be paid more in money for that contract than he would have received if the sale of the car to the retail buyer had been for cash. The amounts which may be so paid to the retail seller, all of which of course go to increase the time price to the retail buyer, are variously

*In addition to the "abuses" mentioned above Appellants, in their attempt to show that the circumstances vindicate the Act as a reasonable and appropriate exercise of governmental authority, refer to two other "elements of the business of instalment selling" (Appellants' Briefs p. 25). The first of these "elements" relates to the Finding (McHenry Finding 35; G.M.A.C. Finding 30) that forms of contracts supplied to retail sellers by finance companies generally contain no provision for a return of any part of the finance charge or time price differential to the buyer in the event he wishes to prepay the contract. The second of these elements relates to the so-called "delinquency charge" (McHenry Finding 36; G.M.A.C. Finding 31; Sections 6, 7 and 26(c) of the Act). The "prepayment provisions" (Section 6 of the Act) are subject to attack on the same grounds as the provisions authorizing the fixing of a maximum finance charge and both this Section and Section 26(c) are attacked on the ground that they illegally delegate legislative power to the Department of Financial Institutions (*infra* pp. 48 and 49).

termed reserves, bonuses, participation, and rebates (McHenry Findings 25, 31, 32, 33 and 34; G.M.A.C. Findings 20, 26, 27, 28 and 29). There is no finding that the practice of making such payments is "detrimental" to retail buyers. On the other hand, the findings show that the "pack" is confined to the business of selling automobiles and the business of purchasing automobile instalment contracts; and that these practices represent only a matter of the dealer's selling policies (same Findings). (4) The retail buyer is not informed as to whether the dealer is to receive any such payments nor is he informed the dollar amount thereof.

Stating it in another way: the retail buyer *might* not know, although the information is available to him, the dollar amount of the finance charge and insurance cost included in the time price of the automobile he is buying; the retail buyer may be led to believe—through a misrepresentation by the retail seller—that when the latter sells the instalment contract he will receive less than what may eventually be paid him by the purchaser of the contract.

Appellants would have this Court believe that these "abuses" (together with the other "elements" of the business of instalment selling referred to in the footnote on p. 37 of this brief) are so "detrimental to the public welfare" as to justify regulation "in the promotion of the public welfare" (Appellants' Briefs p. 3). And Appellants would also have this Court believe that on such a "factual basis for regulation" a statute which fixes the prices at which *all* retail sellers may sell their goods in instalments and which, after the instalment sale is completed, fixes the prices at which the instalment contracts may be bought and sold, is a reasonable and appropriate exercise of governmental

authority to promote the public welfare.* It is submitted that the mere statement of this contention establishes its unsoundness.

The most that can be said in favor of Appellants' position on this point is that the retail buyer, by a proper legislative enactment—and we deny that this Act is such—may be entitled to a more complete itemization, in the written contract, of the terms of sale and of the elements that go into the dealer's mark-up on a retail sale in instalments. Certainly the Act goes too far and is an unreasonable exercise of governmental authority when, in order to accomplish such a purpose,—which for the sake of the argument we will assume to be a proper one—the Legislature proceeds to fix the amount the retail seller may receive for his goods—and, even further, then proceeds to limit arbitrarily the amount for which the dealer may sell the contract (*infra* pp. 47-48).

This Court has held that even where there is proof that "* * * extortion, fraud, imposition, discrimination and the like * * *" are practiced in a business—whether to a large or to a lesser extent, or where there is proof that the business is one which peculiarly lends itself to such practices, the State Legislature is not justified in fixing prices in that business. The existence of such abuses *may* be grounds for regulation "* * * but not for price fixing * * *" (*Ribnik* v. *McBride*, 277 U. S. 350 at p. 358).

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*It is significant that both the Wisconsin and Massachusetts Commissions (whose Reports are referred to at pp. 32 and 33 of Appellants' Briefs) were opposed to any form of statutory fixing of finance charges; that the Wisconsin Legislature adopted the Commission's recommendations on this point (Section 218.01 of the Statutes, Chapter 474, Laws of 1935), and that the Massachusetts Legislature, after hearings during the 1935 Session on Senate Bills 4 and 55 and House Bill 805, failed to enact *any* legislation either in the field of instalment sales or in the field of instalment sales financing.

The strength of this Court's decision in the case of *Ribnick* v. *McBride* (*supra*) as a controlling authority we do not believe to have been weakened by its decision in the case of *Nebbia* v. *New York* (*supra*). In that case, as pointed out above, this Court laid down the principle, first, that the legislative policy or purpose must *reasonably* be deemed to promote the public welfare, and the legislative purpose must be a *proper* one, and second, that the laws passed to accomplish it *must have a reasonable relation to such purpose*. In applying the first phase of this principle this Court held that the purpose of the statute and the policy which it envisaged were proper ones, reasonably deemed to promote the public welfare, because milk is an essential element of human diet and the production and distribution of milk, a paramount industry of the State, "* * * *largely affects the health and prosperity of its people*" (291 U. S. 502, at p. 517). The State of New York was therefore held to be exercising, as "* * * a temporary expedient to redress an injurious economic condition, * * *" an "acknowledged police power" within a proper field—to wit, the sphere of public health and the general welfare.

Borden's Farm Products Co. v. *Ten Eyk,* Vol. 80 L. Ed. 469 at p. 472.

As to the second phase of the principle laid down by this Court in the *Nebbia* case: The milk industry in the State of New York had long been the subject of drastic regulation by the State; *despite such regulation* the industry was near collapse, "and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (291 U. S. 502 at p. 530). We respectfully submit that the important facts are these: Despite long standing and drastic State regulation of the milk

industry in New York—*which, up to the date of the enactment of the statute under consideration in the Nebbia case the legislature had evidently believed it unnecessary to extend to the point of price fixing*—the industry was on the verge of destruction and "the normal law of supply and demand was insufficient" to save the industry and to safeguard the public health. *Under such circumstances, all other means having failed, legislation authorizing the fixing of minimum prices was justified as bearing a reasonable relation to a proper legislative purpose.*

In other cases which have been before this Court, notably the case of *Tyson* v. *Banton,* 273 U. S. 418, and the case of *Fairmont Creamery Co.* v. *Minn.* 274 U. S. 1, the same principle, although differently phrased, as that enunciated in the *Nebbia* case, was laid down by this Court, *i.e.,* that price fixing statutes do not bear a reasonable relation to the legislative purpose, when that purpose is merely to correct "abuses" or "unfair practices" in an industry. A price fixing statute, which by its very character must be all-embracing, cannot be appropriate legislation to accomplish the correction of "abuses", since it must necessarily ignore the distinction between guilt and innocence and "since it applies wholly irrespective of the existence of fraud, collusion or extortion * * *" and, furthermore, "* * * since it of necessity fixes prices as well where evils are absent as where they are present" (*Tyson* v. *Banton,* 273 U. S. 418, at p. 443; and *Fairmount Creamery Co.* v. *Minn.,* 274 U. S. 1 at p. 10).

Since the only purpose of its enactment which on the Records-Facts might be termed a "proper purpose" is to disclose in the written contract of sale certain elements of the time price, the Indiana statute, fixing as it does the

prices of all goods sold in instalment sales, cannot be deemed to have a reasonable relation to a proper legislative purpose, and on this ground alone, must be declared invalid.

* * * * * * * * *

The purpose of the Act as stated by Appellants (Appellants' Briefs p. 10) is "to prevent extortionate and unreasonable prices for credit extended in retail instalment sales of goods * * *". The Appellants say, further, that the provisions authorizing the fixing of the maximum finance charges (as well as maximum delinquency charges and discounts on prepayment) "are of its very essence" (Appellants' Briefs p. 33). The plan of the Act according to Appellants was to provide "for the fixing of maximum finance charges * * * upon such a basis as would protect the retail instalment buyer from unreasonable prices for credit * * *" (Appellants' Briefs p. 43).

The method employed by the statute to achieve this purpose is *first,* to require segregation of the cash price from the balance of the time price and also of the insurance cost and the "finance charge"; *second,* to regulate the amount of the "finance charge", and *third,* in order to make effective the regulation of the "finance charge", to regulate the relations between retail sellers and finance companies and the prices at which retail instalment contracts may be bought and sold (Appellants' Briefs p. 16).

As stated at the beginning of this brief (*supra* pp. 4, 5), it was Appellees' contention in the lower court and it is their contention on this appeal that the "cash price" defined in the Act was intended to be the same "cash price" or "cash sale price" as is defined in the Findings of Fact. Appellants, however, (*supra* p. 5) have advanced the

theory that on a proper construction of the Act *the term "cash price" means the "time price."* If this construction of the Act is adopted, the power to fix the maximum finance charge becomes a futile thing—since it could become operative—if at all—only *after* the finance charge has been determined and made a part of the time price. Viewing the application of this theory of construction in the light of the primary purpose of the Act, *i.e.,* the regulation of the finance charge, one is reminded of the Æsopian proverb: "It is not time to shut the stable when the horses be lost and gone." (William Caxton, *Æsop,* ii, 245.)

If such is the construction to be given to the Act, its primary purpose, to wit, the regulation of what Appellants are pleased to term "the cost of credit" becomes impossible of achievement; and, if Appellants are correct in their contention, the Act must be declared invalid, upon the principle laid down by this Court in the *Nebbia* case, as constituting legislation having no reasonable relation, and which is not adapted, to its avowed purpose.

Even on the construction which we have given to the Act (*supra* pp. 4, 5), the Act fails to accomplish the purpose ascribed to it by Appellants because its application is limited exclusively to those instalment sales in which the cash price of the goods which are the subject matter of the sale has been "agreed upon in good faith" by the parties (Section 1 of the Act). It is the practice of some merchants in certain goods and commodities such as furniture and jewelry to quote or mark their goods with only a time price (McHenry Finding 9) and the Act has no application to instalment sales of such retail sellers. It follows that the Act will affect principally, if not solely, those retail sellers who handle standard priced goods such

as automobiles and refrigerators, the cash prices of which are publicized by the manufacturers and are well known, leaving unaffected retail instalment sales of goods which have no standard or known cash price. It is apparent, then, that the Act will not effect disclosure of the terms of the time-sale transaction or of the time-price, much less regulation of the time-price (or "prepayment discount"), in those instalment sales which peculiarly lend themselves to "concealment" of the "cost of credit" and the imposition of "exorbitant charges", and in which, on Appellants' thesis, regulation is most needed. It therefore fails utterly to accomplish the primary purpose for which it was enacted.

A legislative enactment which would require *all* sellers to disclose in a written contract the price at which they would sell the goods for cash, if the sale were to be a sale for cash instead of one on the instalment plan, would at least avoid the discriminatory effect inherent in the Act under consideration. Certainly if a state can validly fix the maximum by which the time price may exceed the cash price of goods having a standard or at least readily ascertainable cash price, the State would have the power to enact legislation requiring *every* seller making a time sale to state the price at which he would be willing to sell the specific goods in a sale for cash; and it is difficult to see how any greater "administrative difficulties" (Appellants' Briefs, pp. 28-29) would be created in the operation of such a statute than in the operation of the statute under consideration.

The vice in the definition of retail instalment sales is a two-fold vice which, permeating the Act, vitiates its validity in entirety. *First*:—The sweeping breadth of the Act

which by virtue of this definition affects retail instalment sales of all classes of goods, the cash price of which is not in excess of $1,500., results in an unreasonable failure to discriminate as between goods which are luxuries and "conveniences" and goods which Appellants (their Briefs p. 32) would consider "economic necessities". (In this connection it should be noted, as we have pointed out before, that the "primary necessities" are not sold in instalment sales). *Second*:—The Act, as stated above, works a discrimination, which is equally unreasonable, as between sales of goods whose cash prices are well known or at least readily ascertainable and sales of goods not having a standard or well-known cash price.

Because of this two-fold vice no single section of the Act may be given separate validity—even if this Court should fail to agree with Appellants' contentions as to the severability of the Act's provisions which are contained in Point IV of this brief.

POINT III

Sections 9, 10 and 15(d) and Sections 6 and 26(c) of the Act are unconstitutional and void in that they deprive McHenry Chevrolet Company, Inc. of its property without due process of law; and Sections 9, 10 and 15(d) and Section 13 are unconstitutional and void in that they deprive G.M.A.C. of its property without due process of law.

SECTIONS 9, 10 AND 15(d) OF THE ACT: Their briefs indicate quite clearly Appellants' view that these Sections —and also Section 13, the licensing section (*infra* p. 49),—

were enacted solely for the purpose "* * * of carrying out the finance charge provisions of the Act, * * *" to which they " * * * are absolutely essential * * *" (Appellants' Briefs p. 14, see also p. 16). We agree with this view as will be seen later under Point IV (*infra,* p. 52), in which we point out that all of these Sections must fail because of the invalidity of the provisions of the Act authorizing the fixing of maximum finance charges. It is our contention, further, that whether standing alone or merely as an aid to the enforcement of those provisions of the Act which fix the time price of goods, the three Sections referred to in the caption of this paragraph are invalid—Sections 10 and 15(d) both as to the Retail Seller and as to G.M.A.C. because their enforcement would result in fixing the prices at which retail instalment contracts might be sold by the Retail Seller and purchased by G.M.A.C.; and Section 9 as to the Retail Seller, in that it unlawfully interferes with the right of Retail Seller to dispose of his retail instalment contracts to whomsoever he pleases. This Section by its terms would subject the merchant who sells his contracts *outside the state* to the penalties provided for in the Act,—which on its face can have no constitutional justification,—even were it assumed that the state has the power to limit the freedom of contract of a retail seller by limiting his sales within the state to one designated class of purchasers. See *Allgeyer* v. *Louisiana,* 165 U. S. 578.

The transaction whereby Retail Seller sells and assigns an instalment sale contract is an ordinary transaction of sale and purchase. That intangible property may be bought and sold as may tangible property and that such purchases and sales do not fall within the scope or concept

of usury statutes has been established by this Court and by the Supreme Court of Indiana.*

It follows from this that the invalidity of Sections 10 and 15(d) may be urged on the same grounds as are urged above (Points I and II) in attacking the provisions of the Act fixing the maximum finance charge in the original contract of sale between the Retail Seller and his buyer.

Appellants argue that Section 15(d) does not forbid the purchasing by licensees of retail instalment contracts at a less price than the unpaid balance and, in support of this argument, say that such a purchase would only be a ground for the revocation of the finance company's license if " * * * the licensee has wilfully avoided or attempted to avoid *the provisions of the Act* by so doing * * * " (italics ours) (Appellants' Briefs p. 42). Section 15(d) actually provides that the license may be revoked if the Department finds " * * * that the licensee has wilfully avoided or attempted to avoid the *operation or effect of this Act* by purchasing any retail instalment sale contract or contracts at a less price than the unpaid balance thereon * * * ". However, if this provision has any significance at all, it is apparent that its meaning is so vague and indefinite as to render it nugatory.

As to Section 10: In fixing the amount, included in the time price of goods as the finance charge and reflected in the unpaid balance of a retail instalment contract which the purchaser of such a contract is to be permitted to pay

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*_Nichols_ v. _Fearson_, 7 Peters 103; _Billingsley_ v. _State Bank_, 3 Indiana 375. On this point see also _General Motors Acceptance Corporation_ v. _Mid-West Chevrolet Co._, 66 F. (2d) 1 and 74 F. (2d) 386, and _Meserole Securities Co._ v. _Cosman_, 253 N. Y. 130, 170 N. E. 519.

to the seller of the contract, the Department is *expressly directed* to disregard the fact that such contract may have been sold without recourse or with recourse (or under an agreement by which the retail seller agrees to repurchase the specific goods in the event of their repossession on the buyer's default). In other words, the Department is commanded to make no differentiation as between the price to be paid for contracts sold with a "warranty of soundness" and sales which may be made entirely "without recourse". That the standard which this Section sets up is an arbitrary and unreasonable one is obvious, and for this reason alone, it is submitted, Section 10 is invalid, both as to the Retail Seller and as to G.M.A.C.

SECTION 6 OF THE ACT: This section, which relates to "prepayments", has already been mentioned (*supra*, p. 37, footnote). This section, in the sentences immediately following the provision that the finance charge may not exceed the maximum authorized by the Department of Financial Institutions, provides *that every retail buyer shall have the right at any time to pay the purchase price "* * * whether then due or not * * *" and upon such payment to receive a reduction in the unpaid purchase price, the amount of which is to be fixed by the Department.* By these provisions the Retail Seller is deprived of the right to fix on his own terms the time-selling price of his goods.

The power delegated to the Department by Section 6 to fix the amount of the unpaid purchase price to which Retail Seller is to be entitled upon "prepayment" is analogous to the power granted to the Department to fix the total amount of the original time price (*supra*, Points I and II); the validity of the provision in question is accordingly

subject to attack on the same grounds as those set forth under these Points and on the additional grounds (1) that being appendant to the invalid portions of the Act which fix the finance charge, these provisions of Section 6 fall with them (*infra*, p. 52), and (2) that since no standard whatsoever is provided in the Act by which the amount of the prepayment "discount" is to be fixed by the Department, these provisions involve an illegal delegation of the legislative power of the State and therefore involve a denial of due process of law.*

Section 26(c)—Since no standard whatsoever is provided in the Act by which the amount of the "delinquency charge" is to be fixed by the Department, this section similarly involves an illegal delegation of the legislative authority of the State and therefore involves a denial of due process of law.

SECTION 13 OF THE ACT: The qualification which this Section sets up for the granting of a license is one that has already been condemned by this Court. The Section provides that a license to purchase instalment sale contracts may be granted only *"if the Department shall find that the applicant can operate its business economically and efficiently"*. Since the economic and efficient operation of any business is directly dependent upon competitive conditions, the only reasonable construction to be given this standard is that the Department is expressly required to take into consideration the number of finance companies already in

*Article 3, Section 1 of the Constitution of Indiana (Appendix *infra* p. 58); *Zoercher* v. *Agler*, 202 Ind. 214, 172 N. E. 186; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter* v. *United States*, 295 U. S. 495.

the field and the effect which the competition of such companies would have upon the management and operation of the applicant. The validity of this construction is borne out by the sentence of the Act following the words quoted above, which reads: "In considering economic and efficient operation, the Department shall take into consideration the fact that this Act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope." It is submitted that this qualification amounts to a requirement of economic justification and that it is therefore the same qualification as was condemned by this Court in the case of *New State Ice Co.* v. *Liebmann,* 285 U. S. 262. In that case the statute provided that the license could only be issued upon proof showing the necessity for the manufacture of ice in the designated community. The licensing board was authorized to "take into consideration the responsibility, reliability, qualifications and capacity" of the applicant and of the persons already licensed in the community so as "to afford all reasonable facilities, conveniences and services to the public". In holding these requirements to be beyond the power of the State to impose, this Court said (at p. 278):

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment.
>
> * * * * * * * *
>
> "The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

The qualification set up by Section 13, furthermore, is so indefinite as to be incapable of definite application. Before a license is issued the Department is required to find "* * * that the applicant can operate its business *economically and efficiently,* * * *". The Act is silent as to how such "operation" is to be gauged; as to what the criterion of "efficient operation" is to be; as to the extent which the Department must take into consideration the fact that the Act "is designed to promote competition * * *". It is submitted that the standard laid down by this Section, or rather the lack of a standard, grants to the Department a range of action that could not be exceeded by the General Assembly itself. This Section therefor is invalid as an illegal delegation of the legislative power.

The Section is invalid on another ground, namely, that it bears no reasonable relation to the purpose of the Act which, as we have seen above, on Appellants' submission is "the prevention of unreasonable prices for credit" and the elimination of certain "fraudulent" practices. The granting of licenses to those companies only which satisfy the Department that they can operate their business "economically and efficiently" bears no reasonable relation to such a purpose. It is obvious that a corporation may operate economically and efficiently and at the same time exact unreasonable charges and indulge in all of the "fraudulent" practices which, on Appellants' contention, the Act is aimed to prohibit. Conversely, an inefficient company might render services in a manner that would meet with the entire approval of the Department. The economic and efficient operation of a company is a matter which relates solely to the internal management of the business; it has no relation to, nor is it a criterion of, the relation of such business to the public.

POINT IV

If the provisions of the Act authorizing the fixing of maximum finance charges are invalid, all related provisions including those which regulate the sale and purchase of retail instalment contracts, being appendant to such provisions, must fall with them and therefore be declared invalid.

It is abundantly clear, from the Report of the Department of Financial Institutions, from the provisions of the Act itself, and from the Appellants' Briefs (at pages 10, 16, 33 and 34) that the central purpose and "essence" of the Act is the regulation of "finance charges" in instalment sales of merchandise (within the $1,500 class). In form, the provisions of the Act fall into two divisions, the first relating to the instalment sale transaction between the retail seller and the retail buyer and to the finance charge which is an integral part of the instalment sale price, and the other relating to the sale of such contracts by retail sellers and their purchase by finance companies (*supra* p. 2). The correctness of this analysis is conceded by Appellants who, after stating that the business regulated "is that of extending credit to retail buyers in instalment sales of merchandise", then proceed to explain the structure of the Act as follows (Appellants' Briefs p. 16):

> "In order to effect the regulation the Act prescribes the form of contract which must be used by the retail buyer and seller; authorizes the fixing of maximum finance charges, maximum delinquency

charges and minimum discounts; requires the parties to exhibit the agreed price of the merchandise in the contract; provides for the licensing and regulation of finance companies and restricts the right of the retail seller to sell and the right of the finance company to buy retail installment contracts *in order that the maximum charges and minimum discount may be made effective*". (Italics ours.)

To the same effect—at page 34 of their briefs,—Appellants say: *"The restriction of sales of such contracts to licensees * * * is obviously necessary to carry out the general purpose of the Act to limit finance charges * * *"* (italics ours). And, similarly, referring to the provisions of Section 9 (*supra* p. 45) and Section 11, which is the licensing provision, Appellants state (Appellants' Briefs p. 39): "There would clearly be no efficacy in providing for the licensing of finance companies if retail sellers could, with impunity, sell to an unlicensed company; *and without the licensing provision of Section 11, enforcement would be impossible*". (Italics ours.)

Only one conclusion may be drawn from these statements: The provisions of the Act requiring retail sellers to sell their contracts only to licensees, the licensing and regulation of the business of finance companies, and the regulation of the amount of the discount involved in the business of finance companies *would be without object unless the amount of the finance charge can be fixed.* The second phase of regulation included in the two divisions referred to above is supplementary to the first, and since the provisions in the second group would be useless by themselves if the fundamental power to control the finance charge could not be validly exercised, it is unreasonable to

suppose that the General Assembly would have enacted them. It follows therefore that if the right of the Department to fix maximum finance charges is denied, the provisions which require licensing and regulation of licensees, the limitation requiring retail sellers to sell their contracts only to licensees, and the fixing of the purchase price of the instalment contracts must also fall.

The case of *Williams* v. *Standard Oil Co.*, 278 U. S. 235, is apposite. In that case, a State statute attempted to fix the price of gasoline and authorized the Division of Motors and Motor Fuels to make investigations and issue permits. The price fixing provisions of course were held unconstitutional and this Court also held that the remaining provisions of the Act, including certain provisions in respect of rebating and discriminating, must fall. This Court said (at page 243):

> "The function of the division created by Section 1 is to carry those provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in Section 2 is to furnish information to aid in the fixing of proper prices. The requirements in Section 3 that a permit must be obtained before any person can engage in the business of selling gasoline and those in Section 4 that the application therefor must state the character of the business, the number and location of the places where business is to be carried on, the price or prices at which the applicant is then selling gasoline, the cost price thereof, and the price at which he proposes to sell, obviously constitute data for intelligently putting into effect the price-fixing provisions of the law or means to that end. The taxes imposed by Section 10 are solely for the purpose

> of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the legislature would be willing to authorize the collection of a fund for a use which no longer exists."

It would appear from their "Statement of Points to be Relied Upon" (McHenry Record pp. 84-86; G.M.A.C. Record pp. 80-82) that Appellants seek only the survival of the following Sections of the Act, in the event of the " * * * failure * * * of the Sections designed to regulate the cost of credit * * * ": Sections 1-5 inclusive, Sections 21-24 inclusive, Section 28, a part of Section 29, and Sections 30-35 inclusive.

Appellees' position as to the separate validity of Sections 1-5 inclusive has already been stated (*supra* pp. 39, 41). As to Sections 21-24 inclusive: These Sections, which relate to contracts to prevent competition, are so inseparably linked with the general purpose and provisions of the other Sections of the Act as to make it apparent that the General Assembly would not have enacted them as a separate law. The Sections are not general in their application; they do not prohibit monopolistic contracts in the field of instalment selling generally but only those particular contracts which are covered by the Act, that is, contracts involving sales in which the cash price is not in excess of $1,500, may be paid in instalments, and in which the seller has retained a security interest in the goods. By thus restricting the operation of these Sections, the General Assembly has indicated its intent to consider these Sections as an integral part of the general scheme relating to the control

of such sales. Furthermore, these Sections deal only with contracts and "threats" in consequence of which retail sellers may be compelled to sell their instalment contracts to a designated *"licensee"*, to "threats" made by any *"licensee"*, and to payments made to or received by *"licensees"*. It is obvious that these particular Sections become meaningless if, as Appellees contend, the licensing provisions of the Act are invalid, since in such event no *"licensees"* would exist who might become beneficiaries of monopolistic contracts or the makers of the prohibited "threats", or the recipients of the payments referred to in these Sections.

Even conceding the severability of these Sections, they must be declared invalid for the reasons stated above on pages 44-45 of this brief: the vice in the definition of retail instalment sales,—which is the keystone upon which the arch of this entire statute has been built,—would as to these Sections again create an arbitrary and discriminatory result,—for only those manufacturers (and *their* affiliated or controlled finance companies) would be subject to the prohibitions of the Act whose products have standard prices or prices which the manufacturers have publicized to the buying public. All other manufacturers and all of *their* affiliated or controlled finance companies, irrespective of their activities in violation of these Sections, would go harmless.

If, as Appellees contend, the above enumerated Sections may not survive, the remaining Sections enumerated by Appellants, to wit, Sections 28 and 29 and Sections 30-35 would have no efficacy. It follows therefore that there was no error in the decree of the District Court in enjoining the enforcement of the Act *as an entirety.*

Conclusion

Appellants and Appellees have stipulated (McHenry Record, pp. 79-83; G.M.A.C. Record, pp. 76-80) that the special findings of fact made by the trial court constitute all of the evidence and facts necessary to the consideration of the questions presented by Appellants' Assignments of Errors in these causes, and that, with the exception of one (referred to on pp. 30, 31 *supra*), these findings may be treated as supported by the evidence. Appellees submit that the circumstances shown by these findings do not vindicate the Act as a reasonable exertion of governmental authority in the promotion of the public welfare, for the reasons set forth above; that the threatened enforcement of the Act as against each of the Appellees will deprive them respectively of their property without due process of law; and that the decrees of the District Court in both causes, declaring the Act unconstitutional and void in its entirety and enjoining its enforcement as against each of the Appellees herein, therefore should be affirmed.

Respectfully submitted,

JOHN THOMAS SMITH,
PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS,
Counsel for Appellees.

March, 1936.

Appendix

Article 3, Section 1, of the Constitution of Indiana:

> "The powers of the Government are divided into three separate departments: The Legislative, the Administrative and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 709

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Appellee.

MEMORANDUM RE JURISDICTION

JOHN THOMAS SMITH,
PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS,
Counsel for Appellee.

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Appellants,

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GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,
Appellee.

No. 709

MEMORANDUM RE JURISDICTION

I

THE RECORD ESTABLISHES THAT THE MATTER IN CONTROVERSY EXCEEDS, EXCLUSIVE OF INTEREST AND COSTS, THE SUM OR VALUE OF $3,000.

A. Although defendants denied the allegation in the complaint that the matter in controversy exceeds the sum of $3,000 in value, the Record is barren of any evidence in support of their denial: defendants, therefore, failed to sustain the burden, which is theirs, of defeating jurisdiction.

The Complaint alleges, in paragraph Second, that the matter in controversy exceeds the sum of $3,000 in value,

exclusive of interest and costs (G. M. A. C. Record, p. 2). Appellants denied this allegation (G. M. A. C. Record, p. 32).

In support of the general jurisdictional allegation in paragraph Second of the Complaint, Appellee alleged and proved the following specific facts (Complaint paragraph Ninth; G. M. A. C. Record, p. 6; and Findings 1, 2 and 36, G. M. A. C. Record, pp. 45-47 and 70): The net worth of Appellee's business is in excess of $50,000. During the calendar year 1934 it purchased retail instalment contracts in Indiana, aggregating in excess of $7,000,000, and the value of such purchases for the first six months of 1935 was in excess of $4,000,000. During the calendar year 1934 it purchased, in Indiana, approximately 23,000 instalment sale contracts from more than 500 retail sellers. Paragraph Ninth of the Complaint contained a further allegation, which was neither admitted nor denied in the Answer (G. M. A. C. Record, p. 35, paragraph IX) that G. M. A. C. maintains offices in the cities of Indianapolis, Fort Wayne and South Bend, for which it pays yearly an aggregate rental of $13,147; and that it employs on the average 85 employees, whose aggregate salaries amount to approximately $150,000 yearly.

In further support of the general jurisdictional allegation in paragraph Second, the Complaint proceeds, in paragraph Tenth (G. M. A. C. Record, pp. 6-8) to set forth the following allegations all of which were supported by evidence introduced by Appellee in the Trial Court; that the Act (Section 15-d) limits the amount which G. M. A. C. may receive as its gross profit for the purchase of an instalment contract to a sum not exceeding the maximum "finance charge" which may be fixed by the Department of Financial

Institutions,—by prohibiting G. M. A. C. from purchasing any retail instalment contracts at a less price than the unpaid balance thereon; that the Act limits the amount which may be given by G. M. A. C. to retail sellers out of the gross "finance charge" received from retail buyers under instalment sale contracts sold to G. M. A. C. by requiring the Department to fix this maximum amount without regard to any differentiation as between contracts sold to licensees by retail sellers with recourse against such sellers, and contracts sold by retail sellers without recourse against them (Section 10); that the Act (Sections 9 and 11) restricts the sale of instalment sale contracts to those parties only who have received a license from the Department of Financial Institutions and imposes burdensome requirements with respect to the keeping and publicity of records and the payment of license and other fees (Sections 18, 19 and 20); that the Act subjects G. M. A. C. to severe and excessive liabilities, both civil and criminal for each such violation of the Act (Section 29); that these provisions of the Act create uncertainty, which will impair the efficiency of the operations and earnings of G. M. A. C. and which will render hazardous the making of any future commitments or any contracts over definite periods of time for the purchase of retail instalment contracts, and also the determination of its borrowing requirements and the obtaining of capital required in the conduct of its business. In addition, the Complaint alleges (Paragraph Seventh, G. M. A. C. Record, pp. 4 and 5) that the Act requires G. M. A. C. to obtain a license from the Department of Financial Institutions which may reject any application for license if it fails to find that the applicant can "operate its business economically and efficiently," and further alleges

that the Act contains a mandate (Section 10 of the Act) that contracts may not be sold at a higher price if sold *with recourse* or *with a repurchase agreement* than if sold *without recourse,* thereby discriminating against the business of G. M. A. C. which purchases contracts from retail sellers with a repurchase agreement (Record, pp. 48-50) and in favor of other finance companies which purchase contracts *without recourse* (Record, pp. 59-60).

Although Appellant denied the allegations of paragraph Second of the Complaint, the Record shows no evidence in support of this denial or of any of the allegations referred to in the last preceding paragraph of this Memorandum; on the other hand, the findings of fact support the jurisdictional allegations (G. M. A. C. Findings Nos. 1, 2 and 36; Record, pp. 45-47 and 70).

This Court has held that where an allegation of the jurisdictional amount is challenged, the burden of proving the lack of jurisdiction rests upon the parties challenging the jurisdiction. Thus in *Hunt* v. *New York Cotton Exchange,* 205 U. S. 322, this Court said at page 333:

> "On the issue presented by the plea the burden of proof was upon the appellant (the defendant below), and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount."

To the same effect, see:

Healy v. *Ratta,* 292 U. S. 263, at page 271.

B. The record establishes that the value of the business of the Complainant is in excess of $3,000; the jurisdictional requirement is therefore met under the test laid down by the decisions of this Court.

The complaint alleges that the net worth of the Complainant's business is in excess of $50,000 (Complaint paragraph Ninth; G. M. A. C. Record, p. 6), and the Findings of Fact (G. M. A. C. Finding 36; Record, p. 70) support this allegation. The finding in question reads as follows:

> "The net worth of G. M. A. C.'s business is in excess of $50,000. During the calendar year 1934, it purchased retail instalment sale contracts in Indiana aggregating in excess of $7,000,000; and the value of such purchases for the first six months of 1935 is in excess of $4,000,000. During the calendar year 1934, G. M. A. C. purchased in Indiana approximately 23,000 instalment sale contracts from more than 500 dealers."

This Court has held that jurisdiction is to be tested by the value of the object or right to be protected against interference, regardless of the financial injury which might be inflicted upon the Complainant by interference with that object or right, and regardless of whether the interference arises from the acts of private parties or the acts of officers of a State. It is the value of the business and the rights of property inherent in the business the interference with which Complainant is seeking to have enjoined, which tests the sufficiency of the jurisdictional averment, and since the Record in this case establishes without contradiction that the value of Complainant's business exceeds the sum of $50,000, and that such business will be materially affected,

restricted or even suppressed through enforcement of the Act, it follows, on this test, that the jurisdictional requirement has been fulfilled.

The cases in point are the following:

Healy v. *Ratta*, 292 U. S. 263;
Hunt v. *New York Cotton Exchange*, 205 U. S. 322;
Glenwood Light Co. v. *Mutual Light Co.*, 239 U. S. 121;
Berryman v. *Whitman College*, 222 U. S. 334;
Bitterman v. *Louisville & Nashville R. Co.*, 207 U. S. 205.

In the case at bar the relief sought is an injunction against the interference with Appellee's business which will result from the enforcement of a state statute alleged to deprive Appellee of its property without due process of law. As stated by this Court in *Glenwood Light Co.* v. *Mutual Light Co., supra* (at p. 126):

> "Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction."

Similarly in the case of *Healy* v. *Ratta, supra*, this Court said, at page 269:

> "Where a challenged statute commands the suppression or restriction of a business without reference

> to the payment of any tax, the right to do the business, or the injury to it, is the matter in controversy."

In the case of *Bitterman* v. *Louisville & Nashville R. Co.*, 207 U. S. 205, the same principle was enunciated by this Court, which said at page 225:

> "Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced."

Respectfully submitted,

JOHN THOMAS SMITH,
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Counsel for Appellee.

NOTE: Copies of this Memorandum have been mailed to Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

No. 709.—October Term, 1935.

Paul V. McNutt, Governor of the State of Indiana, et al., Appellants, *vs.* General Motors Acceptance Corporation of Indiana, Inc.	Appeal from the District Court of the United States for the Southern District of Indiana.

[May 18, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Respondent, General Motors Acceptance Corporation of Indiana, brought this suit to restrain the enforcement of Chapter 231 of the Acts of 1935 of the General Assembly of Indiana. That Act provides for the regulation of the business of purchasing contracts arising out of retail installment sales, including provisions for licenses, for classifications of contracts, and for fixing maximum "finance charges". The validity of the Act was challenged as depriving respondent of its property without due process of law and denying it the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution. An interlocutory injunction was sought and, upon hearing by three judges (28 U. S. C. 380), a final decree was entered, upon findings of facts and conclusions of law, granting a permanent injunction. No opinion was rendered. The case comes here by direct appeal.

The question arises whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction. Jud. Code, sec. 24 (1), 28 U. S. C. 41 (1). The complaint alleged that the requisite amount was involved and this allegation was denied by the answer. On the argument in this Court, leave was given to file an additional brief upon the question of jurisdiction and respondent has submitted its brief accordingly.

Respondent points to the allegations of its bill that the "net worth" of its business exceeds $50,000; that in 1934 it purchased retail installment contracts in Indiana aggregating in excess of $7,000,000; that the value of such purchases for the first six months

of 1935 was in excess of $4,000,000; and that during 1934 respondent purchased in Indiana approximately 23,000 installment sales contracts from more than 500 retail dealers. These allegations were sustained by the findings of the District Court. The bill also alleged that respondent maintained offices in Indiana for which it paid yearly an aggregate rental of $13,147; that it employed on the average 85 employees whose aggregate annual salaries amounted to about $150,000. Respondent also refers to its allegations that the Act limits the amount which respondent "may receive as its gross profit for the purchase of an installment contract to a sum not exceeding the maximum 'finance charge' which may be fixed by the Department of Financial Institutions",—by prohibiting respondent "from purchasing any retail installment contracts at a less price than the unpaid balance thereon"; that the Act limits the amount which may be given by respondent "to retail sellers out of the gross 'finance charge' received from retail buyers under installment sale contracts" sold to respondent, by requiring the Department "to fix this maximum amount without regard to any differentiation as between contracts sold to licensees by retail sellers with recourse against such sellers, and contracts sold by retail sellers without recourse against them; and that in other respects the statute imposes burdensome requirements which impair the "efficiency of the operations and earnings" of respondent.

Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Bitterman* v. *Louisville & Nashville R. Co.*, 207 U. S. 205; *Berryman* v. *Whitman College*, 222 U. S. 334; *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121; *Healy* v. *Ratta*, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no

light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it.

In the absence of any showing in the record to support that general allegation, the question is upon which party lay the burden of proof. Respondent contends that the burden of proving the lack of jurisdiction rests upon the party challenging the jurisdiction and cites decisions of this Court to that effect. The question is thus sharply presented.

The jurisdiction of the District Court in a civil suit of this nature is definitely limited by statute to one—

"where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000; and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects." Jud. Code, sec. 24 (1), 28 U. S. 41 (1).

Further, the Act of March 3, 1875, c. 137, § 5 (18 Stat. 472) as now applied to the District Courts (Jud. Code, sec. 37, 28 U. S. C. 80), explicitly charges those courts with the duty of enforcing these jurisdictional limitations. The provision in its present form is as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just".

It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case. "Where the law gives no rule, the demand of the plaintiff must furnish one;

but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded". *Wilson* v. *Daniel*, 3 Dall. 401, 407, 408; *Barry* v. *Edmunds*, 116 U. S. 550, 560; *Vance* v. *Vandercook Co.* (No. 2), 170 U. S. 468, 481; *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 85, 86. Where the pleadings properly alleged the jurisdictional facts, as, for example, with respect to diversity of citizenship and jurisdictional amount, it was necessary at common law, and before the passage of the Act of 1875, to raise the issue of want of jurisdiction by plea in abatement. And where the jurisdictional issue was thus raised, the burden of proof was upon the defendant. The objection was waived by pleading to the merits. *D'Wolf* v. *Rabaud*, 1 Pet. 476, 498; *Sheppard* v. *Graves*, 14 How. 505, 510; *De Sobry* v. *Nicholson*, 3 Wall. 420, 423; *Farmington* v. *Pillsbury*, 114 U. S. 138, 143. In equity, the defense could be presented by plea or demurrer but not by answer. *Livingston* v. *Story*, 11 Pet. 351, 393; *De Sobry* v. *Nicholson, supra; Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 333. Demurrers and pleas were abolished by Rule 29 of the Equity Rules promulgated in 1912. 226 U. S., appendix p. 8.

By the Conformity Act of 1872 (17 Stat. 197; R. S. 914; 28 U. S. C. 724) all defenses in civil actions at law were made available to a defendant in the federal courts under any form of plea, answer or demurrer which would have been open to him under like pleading in the courts of the State within which the federal court was held. In that view we decided that where, under the Nebraska Code of Civil Procedure, the answer took the place of all pleas at common law, in abatement or to the merits, the allegation of the citizenship of the parties, which was properly made in the petition and put in issue by the answer, must be proved by the plaintiff. And where the record showed "no proof or finding upon this essential point" the judgment was reversed for want of jurisdiction. *Roberts* v. *Lewis*, 144 U. S. 653, 656-658. See, to the same effect, *Wells Company* v. *Gastonia Company*, 198 U. S. 177, 182.

The Act of 1875, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, "inquire into the facts as they really exist". *Wetmore*

v. *Rymer,* 169 U. S. 115, 120; *Gilbert* v. *David,* 235 U. S. 561, 567; *North Pacific Steamship Co.* v. *Soley,* 257 U. S. 216, 221. This Court has had occasion to consider the application of the statute under varying conditions. See *Barry* v. *Edmunds, supra; Morris* v. *Gilmer,* 129 U. S. 315; *Deputron* v. *Young,* 134 U. S. 241; *Anderson* v. *Watt,* 138 U. S. 694, 701; *Wetmore* v. *Rymer, supra; Steigleder* v. *McQuesten,* 198 U. S. 141, 143; *Gilbert* v. *David, supra; North Pacific Steamship Co.* v. *Soley, supra; Broad-Grace Corporation* v. *Bright,* 284 U. S. 588.

In *Anderson* v. *Watt, supra,* a suit in equity, the Court said that under the Act of 1875 "the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted". In *Wetmore* v. *Rymer, supra,* an action of ejectment, after a verdict and judgment for the plaintiff, the trial court set them aside and entertained defendant's motion to dismiss for want of jurisdiction, giving leave to both parties to file affidavits showing the value of the land in controversy. Upon consideration of the evidence, the trial court decided that the jurisdictional amount was not involved. This Court disagreed with that conclusion. Speaking of the effect of the Act of 1875, the Court observed that the statute did not prescribe any particular mode in which the question of jurisdiction was to be brought to the attention of the court, nor how, when raised, it should be determined. The Court said: "When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the conrtoversy was between citizens of different States, or when, as in the present case the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied.—In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury". But "the questions might arise in such a shape that the court might consider and determine them without the intervention of a jury" and "it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge".

In *Gilbert* v. *David, supra,* an action at law in the federal court

in Connecticut, the question arose with respect to the citizenship of the plaintiff—which was put in issue by defendants' answer. Later, defendants moved to dismiss the cause for want of jurisdiction. Plaintiff then moved to strike that motion from the files upon the ground that it was an irregular method of raising the question and because the matter was already in issue under the pleadings. Taking that view, the trial court directed the trial to proceed upon the question of jurisdiction, and upon hearing the testimony the court found that both parties were citizens of Connecticut and dismissed the action. The judgment was affirmed by this Court. The Court said: "Under the former practice, before the passage of the Act of 1875 . . . it was necessary to raise the issue of citizenship by a plea in abatement, when the pleadings properly averred the citizenship of the parties. . . . The objection may be made now by answer before answering to the merits, or it may be made by motion. . . . It may be raised by a general denial in the answer, where the state practice permits of that course. *Roberts* v. *Lewis,* 144 U. S. 653. In the State of Connecticut, under the form of denial contained in this answer, the answer raised the issue. . . . Moreover, the parties to the suit regarded the matter as at issue under the pleadings, and it was so held by the court. . . . The question was properly before the court". The Court further held that while the question might have been submitted to the jury, the trial court was not bound to take that course and that it was its privilege to dispose of the issue upon the testimony. From the citation of *Robert* v. *Lewis, supra,* it is apparent that the Court considered that the burden of proof upon the issue of citizenship was upon the plaintiff, and it also appeared from the record that the plaintiff assumed that burden upon the trial.

In *North Pacific Steamship Co.* v. *Soley, supra,* the suit was in equity and the question was whether the jurisdictional amount was involved. The plaintiff's allegation to that effect was denied by the answer. Upon hearing the evidence offered by the complainant, and that of the defendant, the trial court held that the jurisdictional amount was not involved and dismissed the suit. On direct appeal to this Court, under the former practice where jurisdictional questions alone were presented, the Court said: "The objection that jurisdiction to entertain the suit did not exist is one which may be taken by answer. *Anderson* v. *Watt,* 138 U. S. 694. Indeed, under

§ 37 it is the duty of the court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the court to determine the question of jurisdiction upon the facts presented, and when brought directly here, it is the duty of this court to review the decision upon the testimony as one presenting a jurisdictional question". The Court then considered the facts and sustained the ruling of the District Court.

The question of the burden of proof was considered by this Court in *Chase* v. *Wetzlar,* 225 U. S. 79. That was a suit in equity in the federal court in New York to enforce "equitable liens upon or claims to the title of personal property", and jurisdiction depended on the presence of the property within the district. 18 Stat. 472; Jud. Code, sec. 57; 28 U. S. C. 118. The allegation of the bill that the property was within the district was traversed by the plea, which was held to be "sufficient in law and form", and to which a general replication was filed. The case was heard upon the pleadings and the trial court ruled that the burden was upon the complainant to establish the existence of the essential jurisdictional facts which the plea traversed, and as no proof had been offered by the complainant the bill was dismissed for the lack of jurisdiction. On direct appeal this Court affirmed the decree.

As to the contention that the defendant was bound to prove the allegations of his plea, the Court observed: "The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard* v. *Graves* (1852), 14 How. 505; *De Sobry* v. *Nicholson* (1865), 3 Wall. 420; *Wetmore* v. *Rymer* (1898), 169 U. S. 115; *Hunt* v. *New York Cotton Exchange* (1907) 205 U. S. 322. And a decision of the Circuit Court of Appeals for the Eighth Circuit in *Hill* v. *Walker,* 167 Fed. Rep. 241, is also referred to as containing a full summary of the decided cases on the subject". The Court distinguished those cases upon the ground that none of them involved the question of jurisdiction under the statute requiring the presence of property within the district. In view of that distinction, the Court thought it unnecessary "to now

consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit when it is found not to be really within its jurisdiction—see *Roberts* v. *Lewis,* 144 U. S. 653, and the cases cited in the dissenting opinion in *Hill* v. *Walker, supra''*, because the Court thought that the doctrine was inapplicable to the case before it. The existence of property within the jurisdiction was deemed to be such a fundamental prerequisite to the exercise of power to render a binding decree that in no possible view could it be said that the plaintiff did not have the burden of proving the essential jurisdictional fact. The Court concluded its discussion of the point by saying: "In other words, even putting aside for the sake of argument the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things rested upon the complainant." *Chase* v. *Wetzlar, supra,* pp. 85-87.

The question which was thus suggested and put aside in *Chase* v. *Wetzlar* is definitely before us in the instant case and should be decided. The Act of 1875 prescribes a uniform rule and there should be a consistent practice in dealing with jurisdictional questions. We think that the terms and implications of the Act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief sub-

ject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty.

Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegation of the bill. There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground.

The decree is reversed and the cause is remanded to the District Court with directions to dismiss the bill of complaint for the want of jurisdiction.

It is so ordered.

Mr. Justice STONE took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.